Selected Guideline Application Decisions for the Fourth Circuit

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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998). The district court did not err in applying a cross-reference that resulted in a substantial increase in the defendants' sentences. The cross-reference in USSG §2K2.1 required the application of the homicide guideline where death resulted from the firearms offense for which the defendants were sentenced; the defendants had previously been acquitted of the homicide in state court. The defendants argued that the increase was so large that it could not be imposed on the basis of conduct they had been acquitted of without a violation of their rights to due process. The court of appeals rejected this argument, reasoning that the USSG §2K2.1(c)(1)(B) cross-reference does not create any presumption that the firearm offense of which the defendants were convicted involved death. Further, the court of appeals reasoned that the increase to which the defendants were exposed on account of the cross-reference, from 42 to 55 years' imprisonment and from 115 to 210 months' imprisonment, respectively, did not implicate due process concerns nor did the cross-reference become the tail which wags the dog of the substantive offense. The cross-reference does not create a new offense or increase the statutory maximum to which the defendants were exposed, but merely limits the discretion of the district court in selecting an appropriate sentence within the statutorily defined range.

§1B1.2 Applicable Guidelines

United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 513 U.S. 978 (1994). The district court erroneously applied USSG §2D1.2 as a specific offense characteristic to increase the defendant's base offense level. The defendant was charged with conspiracy to possess with intent to distribute cocaine and marihuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. The indictment also included a reference to the defendant's use of persons under the age of 18 in furtherance of the conspiracy, in violation of 21 U.S.C. § 861. However, he was never actually charged with this offense, and the jury was never asked to find whether this activity occurred. Nonetheless, the district court enhanced the defendant's base offense level because the indictment gave him notice that his conduct violated section 861. In effect, the district court treated USSG §2D1.2 as a specific offense characteristic. The circuit court disapproved of this approach and concluded that it was inconsistent with the plain language of the guidelines. *But see United States v. Oppedahl*, 998 F.2d 584, 587 (n.4) (8th Cir. 1993) ("Section 2D1.2 does not require a conviction under 21 U.S.C. § 860 in order to consider such drug activities as relevant conduct in calculating the defendant's base offense level." Section 1B1.2 instructs the sentencing judge to determine first the proper guideline and then any applicable specific offense characteristics under that guideline. Section 2D1.1, the guideline applicable in the instant case,

has its own specific offense characteristics which do not include a cross-reference to USSG §2D1.2. Had the Commission wanted to include the use of persons under the age of 18 as a specific offense characteristic, it could have done so under USSG §2D1.1(b).

§1B1.3 Relevant Conduct

United States v. Butner, 277 F.3d 481 (4th Cir.), *cert. denied*, 536 U.S. 932 (2002). The district court erred when it did not include the full amount of the post-conversion deposits in the loss amount involved in the conspiracy to commit bankruptcy fraud. The appellate court held that the district court should have included the deposits as relevant conduct for sentencing purposes based on uncontroverted evidence. The defendant was convicted by a jury of conspiracy to commit bankruptcy fraud and bankruptcy fraud. The amounts of deposit were not in dispute, thus the quantity of loss was not a factual dispute. Those deposits served to link the deposits to the conspiracy. The appellate court ruled that if the district court had looked at the uncontroverted evidence, it would have been established that the post-conversion deposits were conduct relative to the conspiracy for sentencing purposes under USSG §1B1.3.

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court erred in applying a two-level enhancement for reckless endangerment based on USSG §1B1.3(a)(1)(B). The defendant pled guilty to conspiracy to possess with intent to distribute more than 50 grams of cocaine base and possession with intent to distribute 50 grams of cocaine base. The court applied a two-level enhancement because a codefendant, in an attempt to flee the police, drove down a one-way street and crashed the vehicle. The appellate court held that the relevant conduct standards are only to be applied in the absence of any specific provisions to the contrary in the underlying guideline. The court noted that a specific provision exists in Application Note 5 of USSG §3C1.2 which states "under this section, the defendant is accountable for his own conduct and for conduct he aided or abetted, counseled, commanded, induced, procured, or willfully caused." Because the record was incomplete as to whether the defendant's own conduct met the standard set in Note 5, the application of USSG §1B1.3 was inappropriate here.

United States v. Dove, 247 F.3d 152 (4th Cir.), *cert. denied*, 534 U.S. 945 (2001). The district court erred by including conduct that did not violate state law in its "relevant conduct" calculation under USSG §1B1.3. The appellate court held that relevant conduct under the guidelines must be criminal, rather than merely malignant or immoral.[1] The defendant was convicted of violation and conspiracy to violate the Lacey Act, a statute which imposes federal penalties for violations of state law that involve interstate commerce. The defendant sold black bear gall bladders to an undercover agent. The sale was illegal under Virginia state law where the defendant was prosecuted. However, the court concluded that although the offer and acceptance were made over the phone, the sale occurred in West Virginia–where the defendant operated his shop, where the undercover agent picked up his merchandise, and where the sale of the gall bladders was legal. Because the sale did not violate West Virginia state law, the

[1]The court also held that the district court's determination of the market value of the galls, which was based on the average retail price and not the lower "smuggler's price," was not clearly erroneous for purposes of enhancing the sentence under USSG §2F1.1. *Id*. at 159.

necessary nexus for prosecution under the Lacey Act–a violation of state law–was not present, and the conduct was legal. The case was therefore remanded for a recalculation of the sentence excluding the sale of galls as relevant conduct.

United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994). The district court did not err in applying a two-level enhancement for possession of a gun during a drug trafficking crime pursuant to USSG §2D1.1(b)(1) even though the gun belonged to one of several codefendants and the government did not prove that the other codefendants knew anything about it. The Fourth Circuit held that pursuant to USSG §1B1.3, it is appropriate to apply the enhancement to codefendants when it is reasonably foreseeable to them that a co-participant was in possession of a weapon. Quoting the First Circuit, the Fourth Circuit held that "[a]bsent evidence of exceptional circumstances, . . . it [is] fairly inferable that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash." *Id.* at1160. *See United States v. Bianco*, 922 F.2d 910, 912 (1st Cir. 1991).

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The district court erred in applying the abuse of a position of trust enhancement to the defendants based on the acts of their co-conspirator. The circuit court rejected the government's argument that the *Pinkerton* principle that is embodied in relevant conduct applies to the role in the offense adjustments. The abuse of trust enhancement must be based on an individualized determination of each defendant's culpability. Application of *Pinkerton* and USSG §1B1.3 would undermine the purpose of the role in the offense adjustments which seek to distinguish among different levels of culpability.

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). Defendant Patterson pleaded guilty to distributing morphine and Demerol which resulted in the death of a female minor. Defendant Laythe pleaded guilty to aiding and abetting that offense. The defendants argued that the death was not reasonably foreseeable to them, and that in sentencing, the appellate court should "draw an analogy to recent drug conspiracy cases in which defendants, whose convictions are based upon the total quantity of drugs in the conspiracy, are sentenced according to the quantity of drugs reasonably foreseeable to each defendant." The appellate court declined to draw such an analogy, and noted that under the sentencing guidelines, the district court must consider relevant conduct in determining the appropriate offense level. As part of relevant conduct under USSG §1B1.1 (a)(1)(A), the court must consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." The acts of distributing and aiding and abetting the distribution of the drugs are "wholly encompassed within the express language of subsection (A), which does not require a finding of reasonable foreseeability." *Id*. at 146. The convictions and sentences were affirmed.

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003). The district court did not err when it applied the cross-reference under USSG §2D1.1(d)(1) because the murders constituted relevant conduct under USSG §1B1.3(a)(2). The defendant pleaded guilty to aiding and abetting possession with intent to distribute methamphetamine and marijuana. The district court determined his sentence based on the quantity of marijuana involved and then applied the murder cross-reference. The murder cross-

reference called for a life sentence so the district court sentenced him to 40 years–the maximum sentence allowed under the statute for a conviction under 18 U.S.C. § 841(b)(1)(B). The string of thefts for which the defendant was indicted and the double murders that were committed during the course of one of the thefts were all part of the same course of conduct as required under USSG §1B1.3(a)(2). The appellate court held that inasmuch as the district court's determination that the murders were part of the same course of conduct or common scheme or plan was not clearly erroneous, including the murders as relevant conduct was appropriate.

The district court did not err when it held that all of the drugs found should be attributable to the defendant as relevant conduct. The defendant argued that some of the drugs were for his personal use and that only the drugs from the earlier thefts should be counted. However, the later thefts were determined to be a part of the same course of conduct and were therefore properly considered as relevant conduct. Furthermore, the appellate court held that the district court's determination that the whole quantity of drugs were for distribution was not clearly erroneous because the district court based its finding on the overall amount stolen and the fact that the proven purpose of all the thefts was for distribution and not personal use.

United States v. Rhynes, 206 F.3d 349 (4th Cir. 1999), *rev'd on other grounds*, 218 F.3d 310 (2000). The defendants were found guilty of conspiracy to traffic in controlled substances and sentenced to terms ranging from 292 months to life imprisonment after having received managerial enhancements for their roles in the offense. The defendants argued that the district court should have deferred to the jury's $1,000,000 forfeiture verdict in calculating the quantity of illegal drugs foreseeable to them for sentencing purposes. The appellate court disagreed and reiterated that a district court has a separate obligation to make independent factual findings regarding relevant conduct for sentencing purposes. *See United States v. Love*, 134 F.3d 595, 605 (4th Cir. 1998); USSG §1B1.3. Forfeitures may not act as artificial limitations on the district court's sentencing discretion.

United States v. Walker, 29 F.3d 908 (4th Cir. 1994). The district court did not err in its disposition of two sentencing issues related to Federal Rule of Criminal Procedure 32(c)(3)(D), and USSG §1B1.3. First, the defendant argued that the district court erred in its application of Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to address his objection to the presentence report recommendation that he be denied an adjustment for acceptance of responsibility. Second, the defendant argued that the district court erred by finding that the amount of loss caused by the defendant's fraudulent conduct exceeded $200,000 and by increasing his offense level under USSG §2F1.1(b)(1)(l). The Fourth Circuit held that both of the defendant's claims lacked merit. On the first issue, the Fourth Circuit held that given the defendant's "specific objections" to the factual findings underlying the presentence report recommendation that he be denied an adjustment for acceptance of responsibility, it is apparent that the district court satisfied its judicial obligation by making an adequate finding as to the defendant's allegations. *See United States v. Morgan*, 942 F.2d 243, 245 (4th Cir. 1991). On the second issue, the Fourth Circuit held that "[the defendant's] undervaluing of his personal property itself–wholly independent from the government's calculation of the amount of loss–conclusively establishes that the amount of loss exceeded $200,000." 29 F.3d 908 at 913-914. *See* USSG §1B1.3(a)(3).

§1B1.8 Use of Certain Information

United States v. Lopez, 219 F.3d 343 (4th Cir. 2000). The defendant was convicted of distribution of marijuana and conspiracy to possess with intent to distribute marijuana. At sentencing, the government offered the testimony of a special agent regarding the substance of the defendant's proffer statement. The district court used the proffer statement as a secondary basis for making its finding as to drug amount. The district court found that the defendant had distributed more than 1000 kilograms of marijuana and sentenced him to 188 months' imprisonment. The defendant appealed the district court's use of the proffer statement in sentencing given that the agreement expressly provided that any self-incriminating information would not be used in determining the applicable sentencing guideline range. The appellate court agreed with the defendant and vacated his sentence.

United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 525 U.S. 909 (1998). The district court erred in relying on the defendant's statements to his probation officer regarding the amount of cocaine distributed to deny him a reduction for minimal or minor participant. The statements were protected under the defendant's plea agreement from use in determining the defendant's applicable guideline range.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Capers, 61 F.3d 1100 (4th Cir. 1995), *cert. denied*, 517 U.S. 1211 (1996). The defendant was not eligible for retroactive application of an amendment to the commentary to USSG §3B1.1, enacted several months after his sentence was imposed, which would have prevented the application of the enhancement. The circuit court ruled that the defendant was not entitled to retroactive application of the guideline because the amendment created a substantive change in the circuit's operation of USSG §3B1.1. In making this determination, the circuit court noted that USSG §1B1.10 allows for consideration of a reduced sentence only if the amendment is listed in that guideline. The 1993 amendment to USSG §3B1.1 was not listed in USSG §1B1.10. The circuit court recognized, however, that the courts may give retroactive application to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in USSG §1B1.10. However, the circuit court determined the amendment to be substantive rather than clarifying, because it changed the law in the circuit. Prior to the amendment, the Fourth Circuit had concluded that a defendant could receive the aggravated role enhancement without having exercised control over persons; the amendment, however, provides that the defendant must have exercised control over other persons to warrant the enhancement. The circuit court noted that its decision is in accord with other circuit courts holding that an amendment would be classified as substantive, and not clarifying when it cannot be reconciled with circuit precedent. *See United States v. Saucedo*, 950 F.2d 1508 (10th Cir. 1991), *overruled on other grounds by Stinson v. United States*, 508 U.S. 36 (1993). The circuit court recognized and noted its disagreement with the Seventh Circuit's holding in *United States v. Fones*, 51 F.3d 663, 669 (7th Cir. 1995), that the 1993 amendment to USSG §3B1.1 was a clarifying amendment. The Seventh Circuit applied the amendment retroactively even after acknowledging that the amendment "nullified" its interpretation of the guideline.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Lewis, 235 F.3d 215 (4th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001). The district court did not violate the *Ex Post Facto* Clause when it applied the 1998 Guidelines Manual in calculating the defendant's sentence. The defendant was convicted of four counts of filing false tax returns. The first offense occurred on April 13, 1993, when Lewis filed a false tax return for the year 1992. The other three offenses occurred on December 10, 1993, when Lewis filed false amended tax returns for the years 1990, 1991, and 1992. In the interim, on November 1, 1993, the sentencing guidelines were amended so as to increase the base offense level for filing a false tax return. Specifically, Amendment 491 amended the tax table in USSG §2T4.1 so that a tax loss of more than $40,000 resulted in a base offense level of 13, rather than 11. The district court noted that USSG §1B1.11(b)(3) instructs that "if the defendant is convicted of two offenses, the first committed before, and the second after a revised edition of the *Guidelines Manual*, the new Manual is to be applied to both offenses." Thus, as the defendant's offenses were committed before and after a revised edition, the district court applied the revised *Guidelines Manual* (the 1998 *Guidelines Manual*) in determining the defendant's sentence. The defendant appealed, arguing that because the application of the 1998 *Guidelines Manual* resulted in increased punishment for the first incident of tax evasion, the April 13, 1993 violation, the sentence violates the *Ex Post Facto* Clause. The appellate court noted that the Ex Post Facto Clause prohibits, *inter alia*, the enactment of "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *See Weaver v. Graham*, 450 U.S. 24, 28 (1981). Further, the Clause seeks to ensure "that legislative Acts give fair warnings of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.* at 29. The appellate court concluded that §1B1.11(b)(3) does not violate the *Ex Post Facto* Clause. The defendant had ample warning, when she committed the later acts of tax evasion, that those acts would cause her sentence for the earlier crime to be determined in accordance with the *Guidelines Manual* applicable to the later offenses, and thus that the intervening amendment to the tax table would apply. Therefore, the district court was correct in applying the revised edition of the *Guidelines Manual*.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

United States v. Carr, 303 F.3d 539 (4th Cir. 2002), *cert. denied*, 537 U.S. 1138 (2003). The defendant was convicted for intentionally setting fire to an apartment building and causing the death of an occupant. At sentencing, the district court properly cross-referenced the arson guideline to USSG §2A1.1 (First Degree Murder). The defendant then sought a downward departure pursuant to §2A1.1, Application Note 1, which states that a downward departure may be warranted when the defendant did not knowingly or intentionally cause death. At sentencing the district court found that the defendant was recklessly indifferent as to whether people would be in the apartment building, equating reckless indifference with knowledge. Thus, the court denied defendant's request for a downward departure. The court of appeals vacated the sentence

and remanded for a clear finding as to whether defendant knowingly caused the death of another.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint[2]

§2A6.1 Threatening or Harassing Communications

United States v. Brock, 211 F.3d 88 (4th Cir. 2000). The district court erred in applying a two-level enhancement based on finding that the defendant had made more than two threats. *See* USSG §2A6.1(b)(2). The defendant pleaded guilty to one count of violating 47 U.S.C. § 223(a)(1)(E) by making repeated interstate telephone calls for the purpose of harassing his former girlfriend. By the terms of the plea agreement, the defendant admitted only to using "threatening words," but denied that he "actually intended to threaten" his former girlfriend. The parties agreed that the applicable guideline was USSG §2A6.1(a)(2), which set the base offense level at six. The plea agreement additionally provided that the defendant, pursuant to USSG §2A6.1(b)(3), was subject to a two-level sentencing enhancement for violating a court protection order, but recommended a two-level reduction for acceptance of responsibility. *See* USSG §3E1.1(a). The presentence report, however, suggested that the defendant also was eligible for a two-level enhancement pursuant to USSG §2A6.1(b)(2) for making "more than two threats." At sentencing, the defendant objected to the two-level enhancement for making more than two threats. The district court overruled the objection. As a result, the defendant's adjusted offense level at sentencing was eight. On appeal, the appellate court first noted the modifying language of USSG §2A6.1(a)(2) such that, for the guideline to apply, the offense "did not involve a threat to injure a person or property." Otherwise, USSG §2A6.1(a)(1) would apply, with a corresponding base offense level of 12. As a result, "relevant conduct should be considered in determining" which subdivision applies given the modifying language of USSG §2A6.1(a)(2). Consequently, if USSG §2A6.1(a)(2) applies, then the offense, even considering relevant conduct, did not involve threats to injure a person, as would be required for an enhancement under USSG §2A6.1(b)(2) to apply. Therefore, "because application of both provisions would require the district court to make contradictory factual findings," the enhancement for making more than two threats was improper.

United States v. Stokes, 347 F.3d 103 (4th Cir. 2003). The district court erred in imposing a §2A6.1(b)(2) enhancement. Defendant pled guilty to mailing a threatening communication to his wife, whom he suspected of infidelity. At the sentencing, the district court found that defendant was eligible for an enhancement under §2A6.1(b)(2) because his letter included threats against multiple people. The court also found that, in light of defendant's acknowledged difficulties with reading and writing, his letter must have required significant deliberation. Based on these findings, the court rejected defendant's request for a §2A6.1(b)(5) reduction and instead imposed a two-level §2A6.1(b)(2) enhancement. On appeal, defendant argued that the enhancement for multiple threats was erroneous because his entire letter comprised a single threat, even though it was directed at multiple victims. The Fourth Circuit

[2]Effective May 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended §2A4.1 to reflect the seriousness of those offenses involving sexual exploitation. *See* USSG, App. C, Amendment 650.

noted that the issue was whether the provisions of §2A6.1 authorized both an enhancement and a departure when, as here, the defendant made a single communication threatening multiple people. The court noted that if §2A6.1(b)(2) applied whenever a defendant threatened more than two victims, then a defendant who mails a single communication threatening three people could receive both a §2A6.1(b)(2) enhancement and a departure under Note 3(B). The court held that it did not believe the Sentencing Commission intended this result, because departures were generally reserved for factors that were not adequately taken into account in the applicable guideline. In other words, Note 3(B) clarified that the phrase "more than two threats," as used in §2A6.1(b)(2), referred to the number of threatening communications, not the number of victims threatened. Consequently, the district court erred in imposing a §2A6.1(b)(2) enhancement.

United States v. Worrell, 313 F.3d 867 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1948 (2003). The defendant was convicted by a jury on two counts of mailing threatening communications. He appealed the imposition of a six-level enhancement pursuant to §2A6.1(b)(1), which provides for an enhancement if the offense involved conduct evidencing an intent to carry out the threat. The district court based the enhancement on the defendant's history of physically abusing his former girlfriend. The defendant asserted that past abuse could not be used to support the enhancement because the conduct did not constitute "relevant conduct." The court of appeals noted that the Sentencing Commission resolved a circuit conflict on this issue in 1997, clarifying that pre-threat conduct may be used if there is a substantial and direct connection with the offense. In finding that the defendant's past abuse of his girlfriend was substantially and directly connected to the offense, the court of appeals affirmed application of the enhancement for conduct evidencing intent.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States[3]

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). The defendant was convicted of conspiring to transport stolen property and aiding and abetting. The defendant appealed the district court's determination of the value of stolen goods for sentencing purposes. The appellate court noted first that there is no statutory reason why the value of certain goods for jurisdiction purposes should be the same as the value for sentencing purposes. The definition of loss for jurisdiction purposes requires a determination of the value of the goods. Although the application notes to the sentencing guidelines also define loss as the value of the property taken,

[3]Effective January 25, 2003, the Commission, in response to a congressional directive in the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, made several modifications to §2B1.1 pertaining to serious fraud offenses involving a substantial number of victims and their solvency or financial security, destruction of evidence, and officers and directors of publicly traded companies who commit fraud offenses. *See* USSG App. C, Amendment 647. Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, Amendment 617.

value in this context refers to a method for determining the loss to a victim. In other words, loss for guidelines purposes means that value which most closely represents the loss to the victim, and not the monetary value of the property involved. *See* USSG §2B1.1, comment. (n.2). As the district court calculated loss in terms of the monetary value of the property, and not in terms of the loss to the victim, resentencing was required.

§2B3.1 Robbery

United States v. Souther, 221 F.3d 626 (4th Cir. 2000), *cert. denied*, 531 U.S. 1099 (2001). The defendant pled guilty to two counts of bank robbery and was sentenced to 108 months' imprisonment after a three-level enhancement for brandishing, displaying or possessing a dangerous weapon. *See* USSG §2B3.1(b)(2)(E). Where the defendant kept his hands in his coat pockets during the robberies after having handed the teller a note indicating that he had a gun, and it appeared that defendant did have a dangerous weapon, the enhancement was proper even though the defendant did not in fact have a weapon and did not simulate the presence of a weapon with his hands beyond placing them in his pockets. *See* USSG §2B3.1(b)(2)(E), comment. (n.2).

United States v. Wilson, 198 F.3d 467 (4th Cir. 1999), *cert. denied*, 529 U.S. 1076 (2000). The appellate court upheld the district court's application of USSG §2B3.1(b)(4)(B) physical restraint enhancement during a carjacking. The victim agreed to give the defendants a ride to their house. After five minutes of travel, the defendant put a gun to the victim's head and told her to pull over. After pulling over, the defendant told the victim to get out of the car and hand over all the money she had. The victim complied, and the defendants drove off. The defendants were convicted of carjacking (18 U.S.C. § 2119) and a section 924(c) count. The district court applied a two-level enhancement to the defendant's offense level for physical restraint of a person to facilitate commission of carjacking pursuant to USSG §2B3.1(b)(4)(B), and the defendant appealed. The appellate court noted that USSG §2B3.1(b)(4) provides for a two-level enhancement "if any person was physically restrained to facilitate commission of the offense." Furthermore, a physical restraint enhancement is proper under USSG §2B3.1 if the act of physical restraint adds to the basic crime. *See United States v. Mikalajunas*, 936 F.2d 153 (4th Cir. 1991), *cert. denied*, 529 U.S. 1010 (2002). The appellate court concluded that the district court properly applied the physical restraint enhancement. A gun was placed to the defendant's head, and she was prevented from leaving her car, albeit briefly, until the defendants could get her money and control of the car. Thus, the victim was physically restrained to facilitate the commission of the carjacking. In reaching its decision, the appellate court noted that physical restraint is not an element of carjacking, as carjacking does not necessarily involve physical restraint.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

United States v. Kinter, 235 F.3d 192 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001). The appellate court held that when a middleman defendant acts on behalf of a third-party payer of a bribe, the district court may consider the payer's bribe-generated benefits when calculating the "benefit received" under USSG §2C1.1. The defendant was convicted of conspiracy, bribery of a public official, and payment of a gratuity to a public official. An IRS employee, who was the former son-in-law of defendant, informed the defendant that the IRS planned to consolidate many of its computer maintenance contracts into a single, multimillion dollar contract to be awarded to a company certified by the Small Business Administration as a section 8(a) contractor. The defendant and a co-conspirator decided to "sell" the influence of this IRS employee to Washington Data, a contractor, in exchange for kickbacks from Washington Data. The kickback due the defendant and co-conspirator was three percent of the revenue that defendant and co-conspirator secured for Washington Data. The IRS employee was initially paid $300 per week, which later increased to $500 per week after the IRS employee recommended Washington Data to the contracting officer at the IRS and Washington Data obtained its first purchase order. At sentencing, the court determined that defendant paid more than one bribe and that Washington Data's profit was $9.5 million. Such findings required the court to impose a sentence between 46 and 57 months. The defendant appealed, arguing that the court should have only considered the amount that the defendant personally received, which was $350,000, and not the benefit received by Washington Data. The appellate court affirmed the district court's decision to calculate the amount of the payer's benefit. The appellate court noted that the defendant and Washington Data undertook the bribery conspiracy jointly. The appellate court also noted that USSG §2C1.1 commentary states that "for deterrence purposes, the punishment for bribery should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher." The appellate court stated that in cases involving a middleman in a bribery scheme, such as this one, a court should first determine which party was, in actuality, the payer of the bribe and then calculate the gain to the payer. Thus, as long as the profits were reasonably foreseeable or the result of acts aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant, the amount of profit can be used in calculating the "benefit received" under USSG §2C1.1. Here, the appellate court concluded the defendant was active in the entire scheme, and therefore, the amount of profit Washington Data received should be included in the calculation.

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994). The district court properly enhanced the defendant's sentence for influencing an official in a sensitive position pursuant to USSG §2C1.1(b)(2)(B). The defendant was convicted of bribery of a Navy employee who, as supervisory engineer, used his position to acquire and transfer information to the defendant relating to defense contract procurements. The defendant argued that since his Navy contact was only a GS-15 Navy engineer, he was merely a mid-level employee who lacked the power to award contracts on his own. The court of appeals disagreed, citing to the contact's position on the procurement review panel as evidence of his sensitive position. His position on this three person board provided him with the opportunity not only to obtain the information, but also to

influence the Navy's final decision making, since it was unlikely that the Navy would grant a bid without the favorable opinion of the review board.

§2C1.8 Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act[4]

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

United States v. Christmas, 222 F.3d 141 (4th Cir. 2000), *cert. denied*, 531 U.S. 1098 (2001). Two-level enhancement for possession of a dangerous weapon, pursuant to USSG §2D1.1(b)(1), was proper and did not constitute double jeopardy even though the defendant previously had been convicted in state court for the same possession of the same firearm. Under the doctrine of dual sovereignty, federal prosecutions are not barred by a previous state prosecution for the same or similar conduct. *See Abbate v. United States*, 359 U.S. 187 (1959).

United States v. Fletcher, 74 F.3d 49 (4th Cir.), *cert. denied*, 519 U.S. 857 (1996). The defendant argued that the amendments to USSG §2D1.1 and its inclusion in USSG §1B1.10(c) for retroactive application required resentencing. The appellate court agreed and remanded the case for resentencing. The amended guideline provides that each marijuana plant is equivalent to 100 grams of dry marijuana, regardless of the number or sex of the plants involved. Under the amended provision, the defendant was responsible for the equivalent of 72.2 kilograms of dry marijuana (level 22, guideline range 41 to 51 months), rather than 722 kilograms (level 30, guideline range 97 to 121 months). The appellate court noted that despite the guidelines determination that the defendant's offense involved less than 100 kilograms of marijuana, "it appears that he nonetheless will remain subject to the mandatory minimum sentence of 60 months in prison due to his involvement with 100 marijuana plants or more. *See* 21 U.S.C. § 841(b)(1)(B)(vii)."

United States v. Harris, 39 F.3d 1262 (4th Cir. 1994). The district court sentenced defendant Boone to a mandatory minimum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A), based on its aggregation of quantities of different controlled substances involved in the conspiracy, to arrive at 52 grams of cocaine base. Subsequent to his sentencing, the appellate court decided *United States v. Irvin*, 2 F.3d 72, 73, 77 (4th Cir. 1993), *cert. denied*, 510 U.S. 1125 (1994), which noted that although aggregation of drug quantities may be required sometimes under the sentencing guidelines, "section 841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics." The sentence was vacated and remanded for resentencing in light of *Irvin*.

[4]Effective January 25, 2003, the Commission, in response to a congressional directive contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, created this new guideline for penalties for violation of the Federal Election Campaign Act of 1971 and related election laws. *See* USSG, App. C, Amendment 648.

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The defendant was convicted of conspiracy to possess and distribute cocaine base. The district court did not commit clear error in converting all the cocaine powder found in his apartment into cocaine base for sentencing purposes, where credible evidence was presented to establish that the powder cocaine was manufactured into cocaine base for distribution.

See United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994), §1B1.3, p. 3.

United States v. Lipford, 203 F.3d 259 (4th Cir. 2000). The appellate court vacated the defendant's sentence after it reinstated the defendant's 18 U.S.C. § 924(c) conviction. The district court had increased the defendant's sentence by two levels after finding that the defendant possessed a firearm during the drug conspiracy. However, the district court ordered a judgment of acquittal on the defendant's section 924(c) conviction, and the government appealed. The appellate court reinstated the defendant's section 924(c)(1) conviction, which was based on carrying a firearm during and in relation to a drug transaction. The appellate court noted that under certain conditions, the guidelines prohibit an increase in base offense level for possession of a firearm if the same conduct served as the basis for a conviction under section 924(c)(1). The appellate court concluded that the record is sufficiently ambiguous that the district court could have relied upon the same conduct underlying the section 924(c) conviction when it increased the defendant's sentence two levels pursuant to USSG §2D1.1(b)(1). The court vacated the sentence and remanded for the district court to determine whether the increase under USSG §2D1.1(b)(1) is warranted in light of the section 924(c)(1) conviction.

United States v. McAllister, 272 F.3d 228 (4th Cir. 2001). The district court erred in applying the two-level enhancement under USSG §2D1.1(b)(1) for possession of a firearm during a drug felony, a violation of 21 U.S.C. § 841, and remanded the case for resentencing. The Fourth Circuit found that there was no reliable evidence to support the application of the enhancement. The only evidence upon which the district court based the enhancement was contained in a Drug Enforcement Administration (DEA) investigation report. The report was based on the interview of a single person who claimed that he saw the defendant with handguns "on many occasions." The report was admitted into evidence and read into the record, but at no time did the report state whether the handguns were "possessed in connection with a drug trafficking offense." Because the report did not assert that the informant saw the defendant with a handgun during a narcotics transaction, the district court could only speculate as to when the gun was used.

United States v. Strickland, 245 F.3d 368 (4th Cir.), *cert. denied*, 534 U.S. 930 (2001). The district court's error in enhancing sentences beyond the statutory maximum when quantities of drugs were not found by a jury beyond a reasonable doubt was not plain error that affected defendants' substantial rights. The defendants were convicted of conspiracy to engage in drug trafficking–specifically dealing in crack cocaine. Ten defendants challenged their sentence, claiming that because drug quantities were not charged in the indictment and not found by a jury beyond a reasonable doubt, their due process and trial rights had been violated. The appellate court only reviewed the sentences that exceeded the statutory maximum, pursuant to *Apprendi*. In so doing, the court used a plain-error standard of review under which the defendants had to

prove that the admitted error affected their substantial rights. The court held that because "the uncontroverted evidence demonstrated amounts hundreds of times more than the amounts charged," and because in the court's estimation a jury would have come to this conclusion beyond a reasonable doubt, the error did not affect defendants's substantial rights. *Id*. at 380.

United States v. Turner, 59 F.3d 481 (4th Cir. 1995). The district court erred in ruling that the 0.4 mg conversion factor in Amendment 488 did not apply to liquid LSD because liquid LSD is not on a carrier medium. The defendant was convicted of conspiracy to possess with intent to distribute in excess of one gram of LSD, distribution of LSD within 1000 feet of a school, and aiding and abetting in the possession with the intent to distribute marijuana within 1,000 feet of a school. The defendant was sentenced to 108 months imprisonment, six years of supervised release, $220 restitution and $150 special assessment. Amendment 488 instructs courts not to use the weight of the carrier medium in calculating drug quantity for LSD offenses, to treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD and contains an application note which defined liquid LSD as "LSD that has not been placed onto a carrier medium." The defendant argued on appeal that his base offense level should be determined by converting the dosage units of the liquid into LSD quantities using the 0.4 mg conversion factor. The circuit court ruled that ". . . Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level." The court noted that the only reported decision was decided by the Middle District of Tennessee in *United States v. Jordan*, 842 F. Supp. 1031 (M.D. Tenn. 1994). The circuit court noted that the district court in *Jordan* had correctly recognized that plain language of the amendment authorizes the use of "LSD alone" in cases involving liquid LSD. The circuit court further noted that the intent of the amendment was to "remove sentencing disparities based on the varied weight of LSD carrier media and to harmonize the sentences for LSD distribution with the sentences for offenses involving more dangerous controlled substances, such as PCP." The circuit court further noted that Amendment 488 does not contravene the Supreme Court's holding in *Chapman v. United States*, 500 U.S. 453 (1991), that the weight of LSD carrier media should be included in determining the appropriate sentence under 21 U.S.C. § 841(b)(1) because the Supreme Court did not address the proper determination of the weight of LSD when the transactions involve liquid LSD.

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The term "cocaine base" as used in USSG §2D1.1 was not unconstitutionally vague and the 100 to 1 sentencing ratio of cocaine base to powder cocaine under 21 U.S.C. § 841(b) did not violate the Equal Protection Clause. *See United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990); *United States v. Bynum*, 3 F.3d 769 (4th Cir. 1993), *cert. denied*, 510 U.S. 1132 (1994); *United States v. Pinto*, 905 F.2d 47 (4th Cir. 1990). In addition, the 100 to 1 ratio did not constitute racial genocide in violation of 18 U.S.C. § 1901, as Congress did not establish it with the "specific intent" of "destroying" any racial or ethnic group.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

See United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 513 U.S. 978 (1994), §1B1.2, p. 1.

Part F Offenses Involving Fraud or Deceit[5]

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[6]

United States v. Dotson, 324 F.3d 256 (4th Cir. 2003). The defendant pled guilty to attempting to receive in commerce a child pornography videotape. The defendant answered an advertisement and placed an order for a child pornography videotape. On appeal, the defendant argued that the district court erred in applying a two-level increase under USSG §2G2.2(b)(5) for the use of a computer in connection with the offense. The defendant maintained that the enhancement should apply only if he sent out the notice or advertisement. The Fourth Circuit disagreed with the defendant's argument. The court noted that a similar case was decided by the Seventh Circuit, where a defendant downloaded child pornography onto his computer in response to an advertisement. The Seventh Circuit concluded that, pursuant to USSG §2G2.2(b)(5), an enhancement was applicable, even though the defendant had not himself sent out notice or advertisement of the offending material. *See United States v. Richardson,* 238 F.3d 837, 841-42 (7th Cir.), *cert. denied,* 532 U.S. 1057 (2001). Likewise, the Fourth Circuit concluded that under the guidelines, those who seek out and respond to notice and advertisement of such materials are as culpable as those who initially send out the notice and advertisement. The court affirmed the district court's enhancement pursuant to §2G2.2(b)(5).

United States v. Williams, 253 F.3d 789 (4th Cir. 2001). The district court did not err in applying a five-level increase for distribution of child pornography for pecuniary gain. The defendant appealed his sentence for mailing child pornography in interstate commerce, claiming that his conduct was not "distribution" within the meaning of USSG §2G2.2(b)(2) because he did not do it for pecuniary gain. The court of appeals held that including pecuniary gain in the definition of "distribution" in Application Note 1 does not necessarily exclude distribution that is gratuitous. In support of its interpretation, the court cited to the general application principles which state that the use of the word "includes" is not exhaustive. *See* §1B1.1 comment. (n.2).

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[5]Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, Amendment 617.

[6]Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, provided enhancements to the sentencing guidelines for sexual conduct with a minor. *See* USSG App. C, Amendment 649.

Noting a circuit split and adopting the majority position, the court reasoned that such an interpretation is justified by: 1) the policy of punishing those who dispense child pornography more severely than those who receive it, and 2) the fact that there would still be a significant number of gratuitous distribution cases to which the enhancement would not apply. (*E.g.*, advertisers and receivers of child pornography in trafficking chains). In addressing the minority circuits' arguments, the court explained that the intent of the guideline drafters in making the retail value of pornography a basis for graduated punishment was to establish a measure which could act as a proxy for the harm. This intent would be contravened if gratuitous traffickers who *caused the same amount of harm* as the for-profit traffickers were treated more leniently. The court additionally concluded that, even if the definition of distribution were interpreted more narrowly, the defendant's conduct was correctly classified as "for pecuniary gain" because the defendant and the other person exchanged things of mutual value. Such a bartering transaction is also pecuniary in nature.[7]

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[8]

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice[9]

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

United States v. Davis, 202 F.3d 212 (4th Cir.), *cert. denied*, 530 U.S. 1236 (2000). The appellate court held that shooting a gun constituted a "use of explosives" under § 2K1.4. The defendant was convicted of various offenses, including drug conspiracy, criminal property damage (18 U.S.C. § 1326), assault, and firearms offenses, including those offenses that were in connection with a failed drug transaction. The defendant and his partner fired 15 rounds of ammunition into the home of a man he suspected of stealing from them. Two guidelines sections are potentially applicable to an 18 U.S.C. § 1326 conviction: §2K1.4 (property damage by use of explosives) and §2B1.3 (property damage or destruction). In order for the court to apply USSG §2K1.4, it must conclude that "use of explosives" was involved in the "shooting" of the

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[7]It is unclear why the court did not classify this as distribution under USSG §2G2.2(b)(2)(B) – "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." Application Note 1 contemplates the exact "bartering" scenario that occurred in this case *and* the increase would be the same as under subsection (b)(2)(A).

[8]*See* USSG App. C, Amendment 649.

[9]Effective January 25, 2003, the Commission, in response to a congressional directive contained in sections 805 and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, increased the base offense level and added a two-level enhancement to ensure deterrence and punishment of obstruction of justice offenses generally, especially in cases involving destruction or fabrication of documents or other physical evidence. *See* USSG, App. C, Amendment 647.

firearm when the defendant fired into the victim's house. The district court concluded that the shooting into the house qualified as a use of explosives, and applied USSG §2K1.4 over the defendant's objection. The appellate court held that "property damage by use of explosives" under USSG §2K1.4, includes the damage caused by projectiles discharged from a firearm. Although the guidelines do not define "explosive," the term is defined by 18 U.S.C. § 844(j) to include "gunpowders, . . . or [a] device that contains . . . any combustible units . . . that ignition by . . . detonation of the compound . . ., or device or any part thereof may cause an explosion." The appellate court concluded that gunpowder clearly is an "explosive," not only because it is specifically defined by statute, but also by its properties and use. In an elementary sense, "shooting" requires an explosion to expel a projectile from a firearm. Therefore, the ammunition in a loaded handgun is thus an "explosive" under USSG §2K1.4. The appellate court also examined other guidelines for which §2K1.4 is the guideline recommended by the Commission (§§2K2.4 and 2K1.7), and concluded that the "use of explosives" has the same meaning under all three guidelines. The appellate court stated: "[s]entencing based on property damage "by use of explosives" for these section 844 offenses demonstrates that 'use' of explosives under USSG §2K1.4 is intended in the general sense rather than a precise, technical sense." *Id*. at 220. Judge Michael dissented, stating: "[s]imply put, bullet hole damage is damage by use of a gun, not damage by use of explosives. It is too much of a stretch to say anything else." *Id*. at 222.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

United States v. Blount, 337 F.3d 404 (4th Cir. 2003). The district court was correct in refusing to apply an enhancement under USSG §2K2.1(b)(5) because although defendant committed another felony offense the record contained no evidence that defendant possessed the firearm "in connection with" that offense. The question on appeal was whether a §2K2.1(b)(5) enhancement should apply when a defendant acquired a firearm during a theft or burglary but did not use the firearm or show any willingness to do so. The Fourth Circuit determined that in order to answer this question, it had to consider whether the burglary committed by defendant constituted "another felony offense" and, if so, whether the firearm and ammunition underlying defendant's conviction were possessed "in connection with" the burglary. The court held that the burglary did qualify as "another felony offense" but that a §2K2.1(b)(5) enhancement was nonetheless improper because the record did not demonstrate a sufficient nexus between the burglary and defendant's possession of a firearm. The court noted that its past opinions treated "in connection with" as synonymous with "in relation to." *See United States v. Garnett,* 243 F.3d 824 (4th Cir. 2001). In other words, a weapon is used or possessed "in connection with" another offense if the weapon facilitated or has a tendency to facilitate the [other] offense. *Id.* at 829. The firearm must have some purpose or effect with respect to the crime; its presence or involvement could not be the result of accident or coincidence. *See United States v. Lipford,* 203 F.3d 259, 266 (4th Cir. 2000). Accordingly, the district court was affirmed in its decision not to apply a §2K2.1(b)(5) enhancement.

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998). The defendant's convictions on 14 firearms counts, based on 6 guns and ammunition, were unconstitutionally duplicative. The defendant was convicted of seven counts under 18 U.S.C. § 922(g)(1) (prohibited possession of a firearm or ammunition by a convicted felon) and seven under section 922(g)(3) (prohibited possession of a firearm or ammunition by an illegal drug user). The court of appeals held that

while a person must be a member of at least one of the nine classes prohibited from possessing guns under section 922(g), a person who is disqualified from possessing a firearm because of membership in multiple classes does not thereby commit separate and multiple offenses. The offense is determined by performance of the prohibited conduct, not by reason of the defendant's legal status alone. This holding reduced Dunford's number of convictions from fourteen to seven. The court of appeals further held that Dunford's possession of six firearms and ammunition did not constitute seven acts of possession under 18 U.S.C. § 922(g), but rather one. The court reasoned that the statute is not clear as to what conduct is prohibited: possession of any firearm or ammunition could arguably occur every time a person picks up a different firearm; the statutory language does not delineate whether possession of a six-shooter loaded with six bullets constitutes one or two or seven violations. Interpreting 18 U.S.C. § 1202(a), the predecessor to section 922(g), the court had held that when a convicted felon acquires two or more firearms in one transaction and stores and possesses them together, he commits only one offense under the statute. *See United States v. Mullins*, 698 F.2d 686 (4th Cir.), *cert. denied*, 460 U.S. 1073 (1983). Applying that rule, the court held that Dunford's possession of the six firearms and ammunition, seized at the same time from his house, supports only one conviction under 18 U.S.C. § 922(g).

See United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998), §1B1.1, p. 1.

United States v. Garnett, 243 F.3d 824 (4th Cir. 2001). The district court erred by applying the enhancement under USSG §2K2.1(b)(5), for use or possession of a firearm in connection with another felony offense. The defendant was convicted of possession of a machine gun. His sentence was enhanced because he gave the stolen gun to another person, believing that he would receive cocaine base in return. The defendant argued that this transaction did not constitute "use," and that there was no "other felony offense." The appellate court concluded that trading the gun for drugs or selling the gun in order to obtain money to buy drugs both constituted "use." However, the use was not connected to "another felony offense." The PSR identified the "other felony offense" as conspiracy to possess with intent to distribute cocaine base, but it still failed to provide the sufficient nexus between the use prong and felony prong because the alleged conspiracy did not meet the definition of "another felony offense"–one that is "punishable by imprisonment for a term exceeding one year," under the relevant substantive statute. USSG §2K2.1, comment. (n.7). Because the commentary indicates that a felony need not be one that was charged or convicted, the record need only establish the felony by a preponderance of the evidence. Even under the less onerous burden of proof, the record failed to show that the conduct was punishable under the substantive statute for various reasons. First, the requisite *intent to possess* cocaine base was not demonstrated by a preponderance of the evidence. Second, the court failed to make a finding of the amount of cocaine that defendant expected to receive. An amount of less than five grams would only constitute a misdemeanor under the substantive statute. Thus, a finding of the amount was necessary in order to satisfy the "felony" requirement of USSG §2K2.1(b)(5). Although, the appellate court could affirm the enhancement by referencing "'any conduct [in the record] that independently and properly should result in an increase in the offense level,'" the court remanded for development of the record to support such bases. 243 F.3d at 830 (citation omitted). Setting aside the facts of this case, the court held that as a matter of law purchase or possession of any felony amount of drugs

would constitute a drug trafficking crime for purposes of 18 U.S.C. § 924(c)–use of a firearm in connection with a drug trafficking offense. In other words, if possession is proven by a preponderance of the evidence, then violation of section 924(c) can serve as the basis for a USSG §2K2.1(b)(5) enhancement.

United States v. Levenite, 277 F.3d 454 (4th Cir.), *cert. denied*, 535 U.S. 1105 (2002). The district court did not err by including detonators as weapons for a six-level enhancement under USSG §2K2.1(b)(1)(C). The appellate court held that since a firearm, under USSG §2K2.1, includes a destructive device as defined by 26 U.S.C. § 5845, which includes "any combination of parts either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled," a detonator could potentially be a destructive device subject to proof from the government that the defendant intended to use it as a weapon. The government produced evidence that the defendant had no legitimate reason or commercial purpose for possession of the detonators. The government also produced testimony that the detonators were manufactured and designed to set off explosives like dynamite. Finally, the government produced evidence that the detonators were seized from the defendant's house along with various other firearms. The appellate court held that although the evidence presented by the government was circumstantial it was sufficient to support a finding that defendant intended to use the detonators as weapons.

United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court did not err in enhancing the defendant's sentence based on his two prior felony convictions of a "crime of violence" pursuant to USSG §2K2.1(a)(2). The defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He argued that his prior state conviction for involuntary manslaughter was not a "crime of violence" because it was not a specific intent crime and because the catchall phrase of USSG §4B1.2 applies only to crimes against property. The circuit court relied on USSG §4B1.2, Application Note 2 which specifically includes manslaughter within the definition of a "crime of violence." Although the circuit court acknowledged that the application note does not distinguish between voluntary and involuntary manslaughter, it followed *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987), in which the Ninth Circuit held that involuntary manslaughter, by its nature, "involves the death of another person [and] is highly likely to be the result of violence. It thus comes within the intent, if not the precise wording of section 924(c)(3)[(B)]." *Id*. at 863.

United States v. Schaal, 340 F.3d 196 (4th Cir. 2003). Defendant and her husband were arrested when law enforcement officers witnessed them breaking into a home. On appeal, defendant argued that the district court impermissibly double counted by applying both the USSG §2K2.1(b)(4) enhancement–because the firearms were stolen–and the USSG §2K2.1(b)(5) enhancement–because defendant used or possessed a firearm in connection with another felony offense. Defendant argued that the §2K2.1(b)(5) enhancement already took into account the fact that the weapons were stolen and therefore the §2K2.1(b)(4) enhancement constituted double counting. The Fourth Circuit noted that nothing in the guidelines prohibited the application of a §2K2.1(b)(4) and §2K2.1(b)(5) enhancement under the instant circumstances. In Application Note 12 to §2K2.1, the court noted that the Commission had addressed the issue of double counting with regard to §2K2.1(b)(4) without forbidding simultaneous application of the §2K2.1(b)(4) and (b)(5) enhancements. In addition, the court also noted that the two

enhancements were conceptually separate, as evidenced by the fact that either could apply in the absence of the other. Consequently, the court concluded that the district court did not engage in impermissible double counting in applying the two enhancements together.

United States v. Solomon, 274 F.3d 825 (4th Cir. 2001). The Fourth Circuit vacated the sentence and remanded the case for resentencing when a defendant received an eight-level reduction for possessing a firearm solely for lawful sporting purposes or collection under USSG §2K2.1(b)(2). The defendant purchased a 9mm pistol and falsely answered "no" to the question regarding whether he had ever been convicted of a misdemeanor crime on a federal form, violating 18 U.S.C. § 922(g)(9). The district court granted an eight-level reduction under USSG §2K2.1(b)(2) based on the presentence report stating that the reduction applied. The district court found that the reduction was consistent with the presentence report because it found "no indication [the pistol] was used in connection with drugs, robbery or anything nefarious" and no evidence "that it could have been used for collection purposes." The Fourth Circuit noted that the district court applied the lawful sporting purposes or collection reduction despite the fact that there was no evidence of the purpose for which the weapon had been used. Section 2K2.1(b)(2) permits a reduction only if a firearm is possessed "solely for lawful sporting purposes or collection–and no other purpose." Because neither the district court nor the probation officer made any findings as to the exact use of the firearm, it could not be said to fit this definition. Therefore, because the record lacked a factual basis for the reduction, the case was remanded to the district court for resentencing.

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

United States v. Hamrick, 43 F.3d 877 (4th Cir.), *cert. denied*, 516 U.S. 825 (1995). The district court did not err in concluding that the improvised dysfunctional incendiary letter bomb used by the defendant in his attempt to assassinate a United States Attorney was a "destructive device" under 18 U.S.C. § 924(c)(1). The defendant argued that the terms "firearm" and "destructive device" in section 924(c)(1) were interchangeable and thus the district court should have imposed the five-year sentence prescribed for use of a "firearm" instead of the 30-year sentence prescribed for use of a "destructive device." The circuit court, convening en banc, ruled that while "firearm" is defined to include "destructive device," the terms are not interchangeable. Rather, a "destructive device" is a subset of "firearm," and the statute is unambiguous that use of a destructive device shall be punished by 30 years' imprisonment. The circuit court, however, was divided, with two concurring opinions expressing doubt as to whether the dysfunctional bomb was a destructive device, and one dissenting opinion concluding that the bomb was not a "deadly or dangerous weapon" for the purpose of sentence enhancement.

United States v. Hopkins, 310 F.3d 145 (4th Cir. 2002), *cert. denied*, 537 U.S. 1238 (2003). The defendant was sentenced to life imprisonment for offenses stemming from a high-speed car chase through Prince Georges and Montgomery Counties, Maryland. The defendant was convicted of forcibly assaulting and resisting federal agents with a deadly and dangerous firearm, using a firearm in a crime of violence, possessing a firearm as a felon, and intending to distribute cocaine. On appeal, the defendant asserted that the application of a sentencing enhancement for brandishing a firearm was improper because the issue of brandishing was not

submitted to the jury as required by the Sixth Amendment. The court of appeals rejected this contention, noting that the Supreme Court recently determined that Congress did not intend to make brandishing a separate element of an 18 U.S.C. § 924(c) offense, but intended it to be a sentencing factor to be addressed by the court. *Id.* at 154-55 (citing *Harris v. United States*, 536 U.S. 545 (2002)).

United States v. Williams, 152 F.3d 294 (4th Cir. 1998). The defective indictment charging defendant with "possessing," rather than "using" or "carrying," a firearm in connection with a drug trafficking crime under 18 U.S.C. § 924(c) did not amount to plain error. The defendant raised his argument for the first time on appeal; the court of appeals held that, under the more forgiving standard for post-verdict review, the argument fails. The mere failure to track the precise language of the statute does not, without more, constitute error. The imprecision did not render defendant unable to prepare an adequate defense, or to be aware of the charge against him.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Campbell, 94 F.3d 125 (4th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997). The district court correctly determined that the defendant's manslaughter conviction was a crime of violence included in the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and, therefore, properly applied a 16-level enhancement to the defendant's sentence. The defendant argued that the district court improperly applied the statute because his underlying "aggravated felony" conviction occurred in 1989 which preceded the amendment date that extended the definition of an "aggravated felony" to include crimes of violence. The appellate court disagreed, and relied chiefly on *United States v. Garcia-Rico*, 46 F.3d 8 (5th Cir.), *cert. denied*, 515 U.S. 1150 (1995), in holding that the obvious intent of the amendment was to allow the predicated offenses to be used as enhancement penalties for those aliens who had been deported after being convicted of an aggravated felony. Additionally, the court noted that in considering a sentence under USSG §2L1.2(b)(2), all prior felonies, no matter how ancient, were relevant in the determination of a sentence.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[10]

United States v. Barton, 32 F.3d 61 (4th Cir. 1994). The defendant pleaded guilty to attempted money laundering. The district court properly rejected the defendant's argument that USSG §2S1.1(b)(2)'s definition of "value of the funds" should be determined by the amount of money actually used in the government sting. Rather, the "value of the funds" is the amount of money the defendant agreed to launder. To hold otherwise would allow the government to affect a sentencing variable simply by adjusting the amount of flash money used, and it would ignore the amount the defendant agreed and intended to launder. The defendant further argued that the three-level increase under USSG §2S1.1 for laundering drug proceeds did not apply to him because the 1989 version of the guideline sanctions only actual knowledge that the money was the result of a drug transaction, not mere belief that the funds were drug proceeds. Although the defendant believed the money was the result of a drug distribution, in reality it was government sting money. The circuits that have addressed this issue have reached different conclusions. The Eleventh Circuit held that mere belief is "sufficient to trigger an enhancement under the 1989 version of the guideline." *Id*. at 65. *See United States v. Perez*, 992 F.2d 295 (11th Cir. 1993). The Fifth Circuit, however, held that actual knowledge of the source of the funds is required. *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). This court, following the holding of the Fifth Circuit, cited a subsequent amendment to the guideline which added the words "or believed," and its stated purpose to reflect the enactment of a new law which addressed defendants caught in government stings, to support its interpretation that the earlier version of the guideline did not sanction "belief."

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court correctly applied USSG §2S1.1 in quantifying the loss attributable to the fraud scheme of defendants convicted of mail fraud under 18 U.S.C. § 1341, conspiracy to commit money laundering under 18 U.S.C. § 1956(h), six counts of money laundering under §1956(a)(1)(A)(i), and three counts of making false declarations in a bankruptcy case under 18 U.S.C. § 152(3). The Fourth Circuit ruled that the district court's determination of the loss attributable to their fraud scheme was correct despite the defendants' contention that certain amounts of money paid by three non-testifying investors and funds obtained in good faith should not have been included. The Fourth Circuit cited *United States v. Loayza*, 107 F.3d 257, 266 (4th Cir. 1997), to state that the "determination of loss attributable to a fraud scheme is a factual issue for resolution by the district court and we review such a finding of fact only for clear error." The court in this case found no error in the district court's determination under USSG §2S1.1 of the amount of money involved in this type of crime because it is an indicator of the magnitude of the commercial enterprise.

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[10]Effective November 1, 2001, the Commission consolidated §§2S1.1 and 2S1.2 into a single new guideline, §2S1.1, which resulted in increased penalties for defendants who laundered funds derived from more serious underlying criminal conduct, and decreased penalties for defendants whose laundered funds derived from less serious underlying conduct. *See* USSG App. C, Amendment 634.

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

United States v. Abdi, 342 F.3d 313 (4th Cir. 2003). The district court did not err when it concluded that defendants were not entitled to the sentencing reduction offered by the safe harbor provision of USSG §2S1.3(b)(2). Defendants pleaded guilty to conspiracy to structure financial transactions to evade reporting requirements in violation of 31 U.S.C. § 5324. On appeal, defendants challenged the district court's determination that they were ineligible for a reduction of their base offense level pursuant to USSG §2S1.3(b)(2). Defendants argued that they did not and could not know whether the monies they structured were the proceeds of illegal activities or were to be used for illegal purposes and that the district court erred in not applying the generally applicable provisions of USSG §1B1.3(a), which limits or extends a conspirator's sentencing liability to reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. The Fourth Circuit noted that in the instant case the defendants had failed to demonstrate that the proceeds that they structured were from lawful activities and that the monies they transmitted were to be used for a lawful purpose. Accordingly, the defendants were unable to meet their burden of satisfying the conditions for the safe harbor provision to obtain a reduction of their sentence offense level. The court also noted that defendants' argument that their conduct could only be measured by reasonably foreseeable acts in furtherance of the jointly undertaken criminal activity, as provided under §1B1.3(a), failed to recognize that §1B1.3 defined the factors relevant to determine generally the scope for which a defendant was to be sentenced. The factors set forth in §1B1.3(a) were not intended to overrule specific factors made controlling by an applicable guideline. In other words, the specific language of §2S1.3(b)(2) controlled when determining whether the defendants were entitled to the reduction. Consequently, §2S1.3(b)(2)(D) was not limited to defendants' conduct.

Part T Offenses Involving Taxation

§2T3.1 Evading Import Duties or Restrcitions (Smuggling); Receiving or Trafficking in Smuggled Property

United States v. Hassanzadeh, 271 F.3d 574 (4th Cir. 2001). The district court did not err in sentencing a defendant for aiding and abetting the making of a false statement and illegally importing carpets of Iranian origin, violating 18 U.S.C. §§ 542 and § 545 respectively. Hassanzadeh challenged his sentence on three grounds: the method used to calculate the loss figure on which his offense level was based, the value assigned to the carpets, and the inclusion in the sentencing calculation of carpets made before the state of Iran came into existence. The Fourth Circuit held that the calculation used by the court, 25 percent of the items' fair market value in the United States, applies to "items for which entry is prohibited, limited, or restricted," and "harmful" under USSG §2T3.1. The court cited the comment of that guideline, noting the Sentencing Commission's emphasis that the evaded duty "may not adequately reflect the harm to society or protected industries." *See id*. at 578. While the defendant correctly argued that the carpet industry is not a protected industry, the goods for which he was convicted were

specifically banned by an Executive Order, which sought to "ensure that the United States imports of Iranian goods and services will not contribute financial support to terrorism or to further aggressive actions against non-belligerent shipping." *See* Exec. Order No. 12,613, 31 C.F.R. § 560.201 (1987). According to the Fourth Circuit, contribution of financial support to terrorism constitutes greater harm to society than harms usually associated with the illegal importation of goods. Thus, the goods in question clearly fit the definition of posing a significant "harm to society" and received the correct calculation.

The court also found that the district court did not err in its appraisal value of the carpets. The district court based its estimated value of the carpets on numbers given by experts during the trial. This was the correct manner in which a fixed value is assigned according to *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985), which stated, "findings based on the credibility of witnesses require great deference to the trial court's findings." In addition, the Fourth Circuit stated that the district court correctly noted that the offense level the defendant received would have been the same regardless of whether the court accepted the Government expert's appraisal, or whether it averaged that estimate with that of the defendant's expert.

Finally, the Fourth Circuit found that the inclusion of the 42 carpets made before 1935 in the calculation of the loss amount for sentencing purposes was also correct. The defendant had argued that the carpets created before 1935 should not be included as "goods of Iranian origin" because Iran was not recognized as a state until 1935. The Fourth Circuit disagreed stating that "the language, history and purpose the Executive Order (and the regulations interpreting it)" indicate that rugs made prior to 1935 in the area currently known as Iran are "goods of Iranian origin." *See id*. at 582. Accordingly, the importation of these rugs was banned and they should have been included in calculating the loss amount.

Part X Other Offenses

§2X3.1 Accessory After the Fact

United States v. Godwin, 253 F.3d 784 (4th Cir. 2001). The defendant was convicted of harboring a fugitive in violation of 18 U.S.C. § 922(g). The district court erred when it used, as the base offense level for the defendant, the fugitive's actual offense level rather than using the level for the underlying offense. The applicable guideline for harboring a fugitive is the accessory-after-the-fact guideline, §2X3.1, under which subsection (a) sets the base level at "6 levels lower than the offense level for the underlying offense." The "underlying offense" is defined in Application Note 1 as "the offense as to which the defendant is convicted of being an accessory," *i.e*., the fugitive's offense. USSG §2X3.1, comment (n.1). The fugitive in this case was convicted of possession of a firearm by a prohibited person, which carries a base offense level of 14 under §2K2.1(a)(6). Instead of using a base offense level of 14, the district court used the base level of 24 for the defendant, the level that the fugitive was *actually* sentenced to and which reflected enhancements for criminal history. The Fourth Circuit held that there is no support for this interpretation in the language of §2X3.1, because that guideline refers to the level of the "underlying offense" and not the level actually applied to the "principal offender." *Godwin*, 253 F.3d at 787. The Fourth Circuit found support in an analogous decision in the Sixth Circuit, *United States v. Hendrick*, 177 F.3d 547 (6th Cir. 1999), in which the court applied the same "plain language" reasoning to the aider-and-abettor guideline (§2X2.1). The court further reasoned, that if the Commission had intended for the criminal history of the fugitive to

determine the harborer's base offense level, they could have easily made reference to the *principal's actual* offense level. The court noted, however, that the base level could be higher than 14 if the principal had received enhancements for the firearms charge pursuant to USSG §2K2.1 which "involve the actual conduct of the [principal] in the context of the charged offense," as opposed to "enhancements based on the criminal history" of the principal. *Id.* at *4.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The defendants were convicted of several offenses resulting from a complex Medicaid fraud scheme. On appeal, the defendant, Glennis Bolden, argued that the district court erred in applying the vulnerable victim two-level enhancement pursuant to USSG §3A1.1. The Fourth Circuit agreed with defendant-Glennis Bolden. The court noted that, under the 1994 guidelines, a two-part test was used for assessing the applicability of the vulnerable victim adjustment. First, the victim must be "unusually vulnerable," and second, the victim must also have been targeted by the defendant because of the victim's unusual vulnerability. In the instant case, the court noted that, while it was indisputable that the residents of Emerald Health were elderly, and many of them likely suffered from both mental and physical ailments, there were no factual findings showing that the vulnerability of the Emerald Health's residents facilitated defendant-Glennis Bolden's offenses. Furthermore, there were no factual findings supporting the idea that these residents were targeted because of their unusual vulnerability. Accordingly, the court vacated this aspect of defendant-Glennis Bolden's sentence.

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The district court did not err in holding that the adjustment under USSG §3A1.1 for a vulnerable victim applied only to the victim's vulnerability and not to the duration of the offense. The victim in question was brought to the United States by the defendant. She was completely dependant on the defendant as she did not speak the language, did not have control over her own passport or visa, and was illiterate. The defendant and his wife kept her in virtually slave-like conditions, they did not pay her, forced her to work as many as 15 or more hours a day, and the defendant's wife regularly abused her. The defendant charges that because the district court made an adjustment to his sentence under USSG §3A1.1, there can be no further departure based on the duration of the offense. The appellate court held that there was nothing in the record to support the contention that the district court considered duration as a factor in the USSG §3A1.1 adjustment.

United States v. Hill, 322 F.3d 301 (4th Cir.), *cert. denied*, 124 S. Ct. 236 (2003). The defendant was convicted of posing as an investment advisor and defrauding Michael Emmanuel out of more than $100,000 in cash, stocks and annuities. On appeal, the defendant challenged the district court's two-level upward adjustment for vulnerable victim pursuant to USSG §3A1.1. The Fourth Circuit noted that under §3A1.1 a defendant should receive a two-level enhancement if he knew or should have known that a victim of the offense was a vulnerable victim. Furthermore, the court noted that a vulnerable victim is defined as one who is unusually

vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to criminal conduct. In the instant case, Michael Emmanuel was in his mid-sixties, had suffered a stroke, and lived like a hermit. The court held that there was more than enough evidence to support the district court's finding that the vulnerable victim enhancement applied. The district court's sentence was affirmed.

§3A1.2 Official Victim

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001). The district court correctly applied adjustments for assault on an officer and reckless endangerment during flight under §§3A1.2(b) and 3C1.2. Defendants Harrison and Burnett pled guilty to armed bank robbery, 18 U.S.C. § 2113(a), (d), and using or carrying a firearm in a crime of violence, 18 U.S.C. § 924(c). After robbing a bank, the defendants engaged police in a high-speed multiple car chase during which an accomplice fired shots at officers and both vehicles crashed. The defendants argued that the adjustments made were based on the same conduct. The Fourth Circuit found that the adjustments made under USSG §§3A1.2 and 3C1.2 were not erroneous because each was based on separate conduct. The court cited several cases, including *United States v. Rivera-Alicea*, 205 F.3d 480 (1st Cir.), *cert. denied*, 531 U.S. 909 (2000), which held that a high speed chase and shots fired at officers separately endangered police and the public.

The court also found that USSG §§3A1.2 and 3C1.2 were applied correctly to Harrison. Even though he was not carrying a gun, Harrison was accountable for the reasonably foreseeable conduct of the others involved in the furtherance of the jointly undertaken criminal activity under USSG §1B1.3. The court also held that the district court did not err in finding that Harrison could reasonably foresee that one of his armed codefendants could fire a weapon that would create a risk of serious bodily injury and that Harrison "aided and abetted conduct that created a substantial risk of death or serious bodily injury to the children in the getaway cars and the public during the high-speed flight that followed the robbery."

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Nicolaou, 180 F.3d 565 (4th Cir.1999). The district court did not err in applying a leadership enhancement after the defendant's related offenses were grouped. The defendants were convicted of conducting an illegal gambling business, money laundering, and income tax charges. After grouping the offenses, the district court applied a four-level enhancement for leadership in the organization pursuant to USSG §3B1.1(a). The defendant argued that the role adjustment should have been applied to individual offenses before grouping. The appellate court rejected this reasoning, holding that the law in the Fourth Circuit is clear that a role in the offense adjustment is applied after related offenses are grouped. *See United States v. Hartzog*, 983 F.2d 604 (4th Cir. 1993). Furthermore, the appellate court concluded that defendant's gambling offenses were relevant conduct under the guidelines because they occurred during the commission of, and in preparation for "the money laundering." USSG §1B1.3(a)(1). Without the gambling operation, there would have been no ill-gotten gains to launder. The gambling organization was relevant conduct under USSG §1B1.3(a)(2) because the money

laundering counts themselves were grouped based on the amount of money laundered under USSG §3D1.2(d).

United States v. Rashwan, 328 F.3d 160 (4th Cir.), *cert. denied*, 124 S. Ct. 320 (2003). The defendant offered Walker an apartment for her sole use and $2,500 to assist her in getting a car. In exchange, defendant asked Walker to marry him so he could secure permanent residency status. The defendant was convicted of marriage fraud, conspiracy to commit marriage fraud, identification fraud, and making false statements to the INS. On appeal defendant argued that the district court erred in enhancing his offense level two points pursuant to USSG §3B1.1(c) because there was no proof that he exercised any control over Walker. The Fourth Circuit noted that, under USSG §3B1.1, a sentencing court should consider whether the defendant exercised decision making authority for the venture, whether he recruited others to participate in the crime, whether he took part in planning or organizing the offense, and the degree of control and authority that he exercised over others. Furthermore, the court noted that leadership over only one other participant is sufficient as long as there was some control exercised. Based on the record, the court concluded that defendant exercised direction and control over the entire scheme and was responsible for persuading Walker and others to take part in his crimes. The defendant exercised extensive control over Walker throughout the conspiracy. When Walker wanted to back out of the scheme shortly after the wedding, defendant threatened to turn her in to the police if she did not continue to cooperate. The defendant also guided the entire green card application process; he knew what to do or had the information on the immigration process generally, and he guided and suggested to the others what to do. Therefore, the district court did not err in imposing a two-level enhancement on the defendant's sentence for his leadership role.

United States v. Turner, 198 F.3d 425 (4th Cir. 1999), *cert. denied*, 529 U.S. 1061 (2000). The appellate court held that because the offense of intentionally killing and causing the intentional killing of an individual while engaging in a continuing criminal enterprise did not include a supervisory role as an element of the offense, a two-level adjustment pursuant to USSG §3B1.1(c) for the defendant's role in the offense was not impermissible double counting. The defendant was convicted of engaging in a continuing criminal enterprise (CCE), intentionally killing an individual while engaging in a CCE, and racketeering charges. The district court found that the defendant had a leadership role in the murder and applied a USSG §3B1.1(c) enhancement. The defendant contended that the intentional killing and causing the intentional killing of an individual while engaged in a CCE already includes a defendant's supervisory role as an element, and that the enhancement is double counting. The appellate court concluded that although conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 includes a supervisory role as an element, the section 848(e)(1)(A) offense does not. Therefore, because the section 848(e)(1)(A) offense does not include a supervisory role as an element, the district court's application of an adjustment for the defendant's role in the offense is neither double counting nor impermissible.

§3B1.2 Mitigating Role

United States v. Pratt, 239 F.3d 640 (4th Cir. 2001). The district court did not err by refusing to grant a downward adjustment for minor participation in the crime. The defendant was convicted of conspiracy to distribute cocaine. The court held that whether or not the

defendant is a minor participant in the conspiracy is measured not only by comparing his role to that of his codefendants, but also by determining whether his "'conduct is material or essential to committing the offense.'" *Id*. at 646. The district court's determination that the defendant was a "major player" in the conspiracy was not clearly erroneous where he was aware that the drugs were in the car, the drugs were found in his possession, he transported cocaine for the same conspirators in the past, he rented the car and hotel room, and he accompanied other co-conspirators throughout the entire trafficking trip. *Id.*

See United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 525 U.S. 909 (1998), §1B1.8, p. 5.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000). The district court did not err in applying an abuse of trust enhancement, pursuant to USSG §3B1.3. The defendant, a real estate agent, used client's financial information to obtain credit cards. He would then access the victim's mail by using keys to the home provided by the client. The defendant contended that real estate agents do not occupy a position of trust, or in the alternative, that the only victims were the banks, with whom he held no position of trust. The appellate court rejected the defendant's argument, noting that in the Fourth Circuit, a mechanistic approach to the abuse of trust departure that excludes defendants from consideration based on their job titles has been rejected. *See United States v. Gordon*, 61 F.3d 263 (4th Cir. 1995). The appellate court noted that several factors should be examined in determining whether a defendant abused a position of trust. Those factors include: 1) whether the defendant had either special duties or special access to information not available to other employees; 2) the extent of discretion the defendant possesses; 3) whether the defendant's acts indicate that he is "more culpable than the others" who are in positions similar to his and engage in criminal acts; and 4) viewing the entire question of abuse of trust from the victim's perspective. The appellate court stated that in reviewing the factors in the defendant's case, the district court did not err in determining that the defendant held a position of trust. First, the defendant had special access to information as a real estate agent. The agency's clients not only gave the agency confidential information, but also keys to their homes. In addition, the defendant's position made his criminal activities harder to detect. Finally, although the banks may have ultimately borne the financial burden, the clients were victimized as well because their identities and credit histories were used to facilitate the crime.

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The defendants were convicted of several offenses resulting from a complex Medicaid fraud scheme. On appeal defendant-Glennis Bolden argued that the district court erred in applying the "abuse of position of trust" adjustment to her sentence. More specifically, defendant-Glennis Bolden maintained that the district court erred in finding that she occupied a position of trust as to Medicaid, asserting that Medicaid conferred no discretionary authority on her. The Fourth Circuit noted that, under USSG §3B1.3, an adjustment in the base offense level was authorized if the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. Furthermore, the court noted that the question of whether an individual occupied a position of trust should be addressed from the perspective of the victim. In the instant case, the

victims were Medicaid and the American taxpayers. The court concluded that defendant-Glennis Bolden had substantial discretionary authority with regards to Medicaid. Medicaid entrusted her with thousands of dollars in prospective payments to Emerald Health, that were to be used for the benefit of its Medicaid beneficiaries. Her abuse of that authority contributed significantly to the commission and concealment of the fraud scheme. Accordingly, the court affirmed the district court's application of the "abuse of position of trust" adjustment.

United States v. Caplinger, 339 F.3d 226 (4th Cir. 2003). The district court erred in applying a two-level enhancement under USSG §3B1.3 on the ground that defendant abused a position of trust when he misrepresented himself as a prominent physician in an effort to attract investors. Defendant was tried and convicted on six counts of wire fraud and two counts of international money laundering. The question on appeal was whether the district court erred in concluding that defendant's use of his asserted position as a physician amounted to an abuse of position of trust under §3B1.3. The Fourth Circuit noted that application of an enhancement under §3B1.3 required more than a mere showing that the victim had confidence in the defendant; something more akin to a fiduciary function was required. The fact that defendant posed as a physician did not by itself mean that he occupied a position of trust. Defendant did not assume a physician-patient relationship with any of the victims. Rather, the victims were simply investors who invested their money in IPI. Any trust the investors placed in defendant was not based on a special relationship he had with them as a physician, but on the investors' misplaced belief in Weekly's and Kampetis's representations about defendant's credentials and the ImmuStim project's potential for success. The court concluded that although defendant's assumed status as an accomplished physician was used by Weekly and Kampetis to persuade the investors to place money into defendant's venture, the facts did not support the conclusion that defendant, by posing as a physician, occupied a position of trust with the victims as that term was used in §3B1.3 of the guidelines. Accordingly, the district court erred in applying a two level enhancement under §3B1.3.

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court correctly enhanced the defendants' sentence by two levels for abuse of a position of trust according to USSG §3B1.3. The defendant was charged with mail fraud under 18 U.S.C. § 1341, conspiracy to commit money laundering under 18 U.S.C. § 1956(h), six counts of money laundering under section 1956(a)(1)(A)(i), and three counts of making false declarations in a bankruptcy case under 18 U.S.C. § 152(3). The Fourth Circuit stated that the adjustment was permitted because the sentencing court found ample evidence to support an abuse of position of trust. USSG §3B1.3 says that the enhancement applies where the defendant "perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker." Evidence of such actions in this case included the defendant's solicitation of investors through her work as an accountant and as a tax preparer as well as testimony from witnesses who stated that they gave money to the defendant because they trusted her.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The district court erred in applying a USSG §3B1.3 special skill enhancement. The defendant operated a tax preparation business out of his convenience store. He was not an accountant and had no special training in the area of tax preparation. The defendant was convicted of conspiracy to defraud the government and filing fraudulent claims. The district court applied a USSG §3B1.3 special

skills enhancement, relying on the fact that the defendant used some special skills, and that he availed himself of services of co-conspirators who had special skills. The appellate court reversed, concluding that the defendant did not have special skills, and that his co-conspirators' skills were not relevant to the enhancement. The appellate court noted that "role in the offense" adjustments, such as the special skill enhancement, are based on a defendant's status, not based on a co-conspirator's action. *See United States v. Moore*, 29 F.3d 175 (4th Cir. 1994). Therefore, to the extent the district court relied on the special skills of the defendant's co-conspirators, it committed clear error. The district court also erred in its interpretation of the guidelines by concluding that tax preparation as practiced by the defendant was a special skill. The appellate court noted that a special skill usually requires substantial education, training or licensing, and that the record reflected that the defendant did not have any formal training in the areas of tax preparation. The defendant only had experience in tax preparation, a skill that millions of Americans exercise every year. His role in the conspiracy was to gather information from clients and to fabricate dependents, income information, filing status, and tax credit claims. These are not skills that one normally obtains through substantial training. Thus, the appellate court reversed the district court, concluding that the defendant did not possess a special skill within the meaning of USSG §3B1.3.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The defendant worked as one of two group leaders in the Sales Audit Department at Woodward and Lothrop department stores. She held this position for ten years. The defendant used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately $40,000. The district court enhanced the defendant's sentence two levels under USSG §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argued that the enhancement was unwarranted because her position did not fall within the definition of "public or private trust." The defendant relied on *United States v. Helton*, 953 F.2d 867 (4th Cir. 1992), to support her argument that her position was functionally equivalent to an ordinary bank teller. The district court rejected defendant's argument and distinguished *Helton*. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions. The fraud committed by the teller in *Helton* did not require any special access. The appeals court affirmed the district court's conclusions and the two-level enhancement.

See United States v. Moore, 29 F.3d 175 (4th Cir. 1994), §1B1.3, p. 3.

§3B1.4 Using a Minor to Commit a Crime

United States v. Murphy, 254 F.3d 511 (4th Cir.), *cert. denied*, 534 U.S. 1073 (2001). The district court did not err by enhancing the defendant's base offense level by two points pursuant to USSG §3B1.4, which allows an enhancement for using a minor to commit a crime. The defendant, who was under 21 when the crime was committed, was convicted of a carjacking during which he directed a minor to get into the car and hold a gun to the victim's head as they were being chased by the police. The court held that the plain language of the congressional directive to "promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense," did not expressly prohibit a younger defendant from receiving such an enhancement. *Id*. at 513. Absent an express prohibition, the Commission was within its discretion to expand the class of defendants subject to the enhancement to those younger than 21 years of age.

§3B1.5 Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence[11]

Part C Obstruction

§3C1.1 Obstruction or Impeding the Administration of Justice

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court correctly enhanced the defendants' sentence for obstruction of justice under USSG §3C1.1. The defendants were charged with mail fraud under 18 U.S.C. § 1341, conspiracy to commit money laundering under 18 U.S.C. § 1956(h), six counts of money laundering under section 1956(a)(1)(A)(i), and three counts of making false declarations in a bankruptcy case under 18 U.S.C. § 152(3). The district court found the defendants guilty of perjury after they testified that they lacked fraudulent intent. The Fourth Circuit stated that USSG §3C1.1 permits an increase in the defendant's offense level by two levels if the defendant commits perjury by giving "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *See United States v. Dunnigan*, 507 U.S. 87, 96 (1993); *United States v. Keith*, 42 F.3d 234 (4th Cir. 1994). Because the defendants fulfilled this requirement, the court applied the enhancement accordingly.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The defendant was convicted of conspiracy to defraud the United States and filing fraudulent tax return claims in connection with a rapid refund enterprise. The defendant appealed only his sentence specifically with respect to an enhancement for obstruction of justice and an enhancement for use of a special skill. After the trial, but before sentencing, the probation officer charged with preparing the presentence report interviewed the defendant. According to the probation officer, the defendant denied knowingly listing false information on the tax returns, recording only the information provided

[11]Effective November 1, 2003, the Commission, in response to a congressional directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 108-21, provided enhancements for any crime of violence or drug trafficking crime in which the defendant used body armor. *See* USSG, App. C, Amendment 659.

to him by his clients, the validity of which he did not investigate. As a result, the defendant denied engaging in any criminal activities. Noting a "denial of guilt" exception to the obstruction of justice enhancement (*see* USSG §3C1.1, comment. (n.1)), the appellate court nevertheless affirmed its application inasmuch as the defendant's statements to the probation officer "went beyond merely denying his guilt and implicated his taxpayer clients in the scheme to defraud the IRS," and were material inasmuch as the statements could have affected the sentence ultimately imposed. *See* USSG §3C1.1, comment. (n.3(h)); *United States v. Dedeker*, 961 F.2d 164, 167 (11th Cir. 1992) (stating threshold for materiality is "conspicuously low"). The appellate court, in *dicta*, also noted that it declined to adopt the Eleventh Circuit's position in *United States v. Gardiner*, 955 F.2d 1492 (11th Cir. 1992), that a presentence explanatory assertion of innocence, similar to one in the instant case, could not be material to sentencing as a matter of law inasmuch as to believe the assertion would require disregarding the jury's verdict.

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The Fourth Circuit reversed the decision of the district court, finding that it improperly applied USSG §3C1.1 after the defendant fled and failed to appear at his sentencing hearing. The defendant pled guilty to drug trafficking and was released on bond pending sentencing. He then failed to appear at his sentencing hearing because he feared the length of his upcoming sentence. The evidence of the defendant's conduct was undisputed. The defendant failed to appear at scheduled meetings and avoided apprehension by police for more than six months. The district court refused to enhance Hudson's sentence because it accepted his explanation for his absence. The Fourth Circuit held that his flight served as a wilful obstruction of justice and remanded the case so that the defendant could receive the sentence he deserved. According to the court, "§3C1.1 directs a sentencing court to increase a defendant's offense level by two levels if the defendant willfully obstructed or impeded the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct." USSG §3C1.1, comment. (n.4(e)).

United States v. Stewart, 256 F.3d 231, 253 (4th Cir.), *cert. denied*, 534 U.S. 1049 (2001). The district court did not err by finding that defendant obstructed justice and by enhancing defendant's sentence by two levels pursuant to USSG §3C1.1 where the defendant engaged in continuous misconduct throughout the trial, making gun-like hand gestures and shouting outside the jury room in an attempt to intimidate the jurors.

United States v. Sun, 278 F.3d 302 (4th Cir. 2002). The district court did not err when it enhanced the sentence of a defendant because he willfully made materially false statements when he testified in his defense at trial. The defendant was convicted of conspiracy to export defense articles on the United States Munitions List without a license and conspiracy to commit money laundering in violation of 19 U.S.C. § 371, 18 U.S.C. § 1956(a)(2), and 22 U.S.C. § 2778. Section 3C1.1 permits the court to raise a defendant's offense level two levels if the defendant "willfully obstructed or impeded . . . the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." The obstruction of justice enhancement must be applied if the defendant commits or suborns perjury according to USSG §3C1.1 (n.4(b)). Under *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995), in order to apply the obstruction of justice enhancement based on perjury, the sentencing court, by a preponderance of the evidence must find three components: (1) the defendant gave false

testimony, (2) about a material matter (3) with the wilful intent to deceive. The enhancement in perjury situations is not automatic every time a defendant is convicted. In this instance, the district court found that the defendant made several materially false statements with the willful intent to deceive the court including his reliance on the advice of counsel, on the advice of a State Department official, and in his denial of his intent when he committed the illegal act. Because the defendant lied about these material issues and matters at the heart of the case, the court found sufficient willful intent to deceive and rejected the defendant's challenge to the two-level increase.

§3C1.2 Reckless Endangerment During Flight

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court erred in applying a two-level enhancement for reckless endangerment based on USSG §1B1.3(a)(1)(B). The defendant pled guilty to conspiracy to possess with intent to distribute more than 50 grams of cocaine base and possession with intent to distribute 50 grams of cocaine base. Her offense level was enhanced by two levels because a codefendant, in an attempt to flee the police, drove down a one-way street and crashed the vehicle. Under USSG §3C1.2, a defendant's offense level may be increased 2 levels for "reckless creat[ion of] a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." The behavior was applied to the defendant's offense level based on the relevant conduct provisions of USSG §1B1.3. However, the appellate court stated that provisions of USSG §1B1.3 are only to be applied absent any specifications to the contrary. Application Note 5 of §3C1.2 limits the defendant's responsibility for acts of another to circumstances in which he "aided or abetted, counseled, commanded, induced, procured, or willfully caused that conduct." The appellate court held that in order to apply the behavior of a codefendant there must be "some form of direct or active participation consistent with Application Note 5." Therefore the appellate court vacated the defendant's sentence and remanded the case for resentencing.

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001). The district court correctly applied adjustments for assault on an officer and reckless endangerment during flight under USSG §§3A1.2(b) and 3C1.2. Defendants Harrison and Burnett pled guilty to armed bank robbery, 18 U.S.C. § 2113(a), (d), and using or carrying a firearm in a crime of violence, 18 U.S.C. § 924(c). After robbing a bank, the defendants engaged police in a high-speed multiple car chase during which an accomplice fired shots at officers and both vehicles crashed. The defendants argued that the adjustments made were based on the same conduct. The Fourth Circuit found that the adjustments made under USSG §§3A1.2 and 3C1.2 were not erroneous because each was based on separate conduct. The court cited several cases, including *United States v. Alicea*, 205 F.3d 480 (1st Cir.), *cert. denied*, 531 U.S. 909 (2000), which held that a high speed chase and shots fired at officers separately endangered police and the public.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts[12]

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The defendants were convicted of several offenses resulting from a complex Medicaid fraud scheme. On appeal, the defendants argued that the district court erroneously grouped their fraud and money laundering convictions. The Fourth Circuit noted that in construing §3D1.2(d), it had concluded that fraud and money laundering offenses should only be grouped when they are closely related. In *United States v. Walker,* 112 F.3d 163 (4th Cir. 1997), the Fourth Circuit approved the grouping of fraud and promotion money laundering offenses because the money laundering activities were an essential aspect of the fraud scheme. The court held that the *Walker* principles were applicable to the instant case because the money laundering and the Related Party Transactions were not only closely related, they were inextricably intertwined. In other words, the defendants' money laundering activities were essential to achieving the improper extraction of monies from Medicaid, and their money laundering and fraud activities were part of a continuous, common scheme to defraud Medicaid. Consequently, the court concluded that the district court had properly grouped the fraud and money laundering offenses because they were closely related.

United States v. Pitts, 176 F.3d 239 (4th Cir.), *cert. denied*, 528 U.S. 911 (1999). The appellate court upheld the district court's decision not to group the defendant's attempted espionage and conspiracy to commit espionage convictions for sentencing purposes. The district court determined that the defendant's conduct was not a single course of conduct with a single objective as contemplated by USSG §3D1.2. The appellate court stated that counts which are part of a single course of conduct with a single criminal objective and represent one composite harm to the same victim are to be grouped together. However, if the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal, then the district court should not group the offenses. In the case at bar, the district court properly determined that the counts of conviction did not constitute a single course of conduct with a single objective, and that the counts should not be grouped together. The appellate court noted that the district court carefully considered the undisputed facts that the counts depended upon two separate time periods, involved the supplying of information to two distinct sets of people in two separate locations, and resulted in the passage of an entirely different category of sensitive materials involving separate and distinct instances of harm. Furthermore, the defendant's actions were not connected by a common criminal objective.

United States v. Walker, 112 F.3d 163 (4th Cir. 1997). The district court correctly calculated the defendant's sentence involving mail fraud and money laundering. The district court grouped the counts together pursuant to USSG §3D1.2(d) and applied the higher base offense level for money laundering under USSG §3D1.3(b). Along with other adjustments, the defendant received a four-level specific offense characteristic increase under the money laundering guideline because the fraudulent scheme involved between $600,000 and $1,000,000.

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[12]Effective January 25, 2003, the Commission, in response to a congressional directive contained in the Bipartisan Campaign Reform Act of 2002, included §2C1.8 offenses among those listed under §3D1.2(d) in which the offense level is determined largely on the basis of the total amount of harm or loss of some other measure of aggregate harm. *See* USSG, App. C, Amendment 648.

The defendant argued that in determining his specific offense characteristic, the district court should have considered only $5,051.01 in fictitious interest payments specifically identified in the money laundering counts of the indictment. The government argued that all of the allegations in the mail fraud counts, which the defendant conceded involved $850,913.59, were incorporated into the money laundering counts by the grand jury. Furthermore, the facts of the case established that the mail fraud and money laundering crimes were interrelated. The Fourth Circuit held that the defendant's money laundering was part of the fraudulent scheme because the funds were used to make fictitious interest payments. The defendant essentially conceded the offenses were closely related when he pleaded guilty to money laundering under the particular provision of the statute that forbids conducting financial transactions involving the proceeds of a specified unlawful activity "with the intent to promote the carrying on of [the] specified unlawful activity." Additionally, the circuit court found that the sentencing guidelines permitted the district court to use the amount of money the defendant obtained through mail fraud as the basis for calculating his specific offense characteristic under the money laundering guideline. The court relied on the Eleventh Circuit's decision in *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996), which held that a court was "required to consider the total amount of funds that it believed was involved in the course of the criminal conduct" when determining the specific offense characteristic under the money laundering statute.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[13]

United States v. Dickerson, 114 F.3d 464 (4th Cir. 1997). The district court erred in giving the defendant credit for acceptance of responsibility and for reducing his sentence pursuant to USSG §3E1.1. On appeal, the government argued that the district court improperly adjusted the defendant's sentence based on two grounds: the defendant saved both the court and the government real time in both having to go through with a jury trial; and the defendant never indicated at trial that he did not accept the fact that he lied. The Fourth Circuit held that the lower court erred in basing the defendant's sentence reduction on those two factors. The guidelines make no distinction between a bench and a jury trial. The relevant distinction is between a defendant who puts the government to its burden of proof at trial and a defendant who does not request a trial. *See* USSG §3E1.1, comment (n.2). Additionally, the circuit court found that, at least in part, the defendant went to trial to attempt to prove that his lies to the grand jury were not "material." Because materiality is an essential element of any perjury offense, in asserting his lies were not "material," the defendant challenged his "factual guilt." For these reasons, the defendant did put the government to its burden and, therefore, the defendant was not entitled to an acceptance of responsibility reduction.

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The Fourth Circuit reversed the district court ‘s decision to grant the defendant a reduction in his sentence under USSG §3E1.1

[13]Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion. *See* USSG, App. C, Amendment 649.

because of his acceptance of responsibility. The defendant pled guilty to drug trafficking, 21 U.S.C. § 841(a)(1). However, because the Fourth Circuit found that the defendant had engaged in conduct that constituted obstruction to justice, the reduction was precluded. The court found that the defendant could not demonstrate that his circumstances presented an "extraordinary case" enough to warrant an acceptance of responsibility reduction even when the defendant's conduct supported an obstruction of justice. Therefore, the case was remanded to the district court so that the defendant could receive the appropriate sentence.

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003). The district court did not err in its refusal to reduce defendant's base offense level for acceptance of responsibility. The appellate court held that there was no error because defendant clearly did not accept responsibility. The court asserts that since USSG §3E1.1 states that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." Here, the defendant filed an appeal denying the amount of drugs ascribed to him by the court under a relevant conduct analysis and he also denied his culpability in the murders listed as relevant conduct by the court. The appellate court agrees with the district court that such denials do not constitute acceptance of responsibility.

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). The defendant was convicted of conspiring to transport stolen property and aiding and abetting. The defendant appealed the district court's denial of granting an adjustment for acceptance of responsibility, arguing that it was clear error for the district court to refuse to consider his polygraph evidence at sentencing given that such evidence clearly entitled him to a downward departure. The polygraph evidence, however, only indicated defendant's continued denial of responsibility because it only served as evidence that he did not realize that the property was stolen, *i.e.*, that he did not commit the crime for which he was charged. Consequently, the district court did not commit any error in denying the decrease for acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Dixon, 230 F.3d 109 (4th Cir. 2000). The appellate court held that suspended time on a defendant's prior state convictions should not count as time served under the sentencing guidelines. The appellate court vacated the district court's sentence and remanded for re-sentencing. The defendant pled guilty to possessing crack cocaine with intent to distribute. The district court assigned the defendant two criminal history points for a prior sentence he received in Florida state court. The defendant's prior sentence in Florida was for aggravated battery. He was sentenced to serve 60 days in jail with credit for time served, which was 23 days. The 60-day jail sentence was suspended and he was put on probation. Subsequently, Dixon had his probation revoked and the Florida court sentenced him to time served, which was 35 days. Thus, in total, the defendant served 58 days in prison for the Florida charges. The district court concluded that all 60 days of the original sentence should be counted toward the 60-day threshold in USSG §4A1.1(b) and assigned two points for the offense. The

defendant appealed, arguing that he should have received only one criminal history point. The defendant contended that because his sentences were suspended, he only served a total of only 58 days, which would be 2 days short of the 60 days under USSG §4A1.1(b). The appellate court initially noted that USSG §4A1.2(k)(1) and Application Note 11 instruct that the terms of imprisonment should be aggregated. Further, the appellate court, relying on a Third Circuit case similar to the case at bar, concluded that USSG §4A1.2(b)(2) instructs that suspended sentences are counted by the time not suspended, rather than the time imposed. In *United States v. Tabaka*, 982 F.2d 100, 102 (3d Cir. 1992), the Third Circuit held that "if part of a sentence of imprisonment was suspended, then a 'sentence of imprisonment' refers only to the portion that was not suspended." Therefore, as Dixon had only part of his sentence suspended, the court must use the time served to determine if the defendant served 60 days in prison. Because Dixon actually served only 58 days imprisonment, he is not eligible for the "at least sixty" day requirement in USSG §4A1.1(b). Therefore, the appellate court vacated the defendant's sentence with instructions that the district court must award only one point in the criminal history category under USSG §4A1.1. *See also United States v. Levenite*, 277 F.3d 454 (4th Cir.), *cert. denied,* 535 U.S. 1105 (2002) (the district court properly applied enhancement under USSG §4A1.1(a) where the defendant served only 2 days for a conviction for which a maximum sentence of 23 months was imposed).

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999), *cert. denied*, 529 U.S. 1112 (2000). The defendant was convicted of conspiracy to possess marijuana with intent to distribute and aiding and abetting possession with intent to distribute marijuana. The defendant appealed the district court's sentencing him as a career offender. Pursuant to USSG §4B1.1(3), to qualify as a career offender, a defendant must have been convicted of at least two prior felonies involving either a crime of violence or a controlled substance. Section 4A1.2(a)(2) provides that prior sentences imposed in unrelated cases are counted separately, but prior sentences imposed in related cases are counted together as a single sentence, such as when they were consolidated for trial or sentencing. Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. *See* USSG §4A.1.2, comment. (n.3). Consequently, the two prior felony convictions properly were considered as separate for purposes of qualifying the defendant as a career offender.

United States v. Mason, 284 F.3d 555 (4th Cir. 2002). The district court erred when it used a juvenile sentence in a determination of the defendant's career offender status. The appellate court held that the defendant's robbery conviction, sustained when he was a juvenile cannot be used to compute his career offender status. Under Application Note 7 to §4A1.2, a conviction may only be counted if it was an adult conviction. Only convictions counted under §4A1.2 can be used for the purpose of determining career offender status under §4B1.1. The defendant pled guilty to distributing cocaine base in violation of 21 U.S.C. § 841(a)(1). The probation office recommended that the court categorize the defendant as a career offender based on his two prior convictions, one of which was a juvenile sentence. According to USSG §4A1.2(d), because the defendant received a juvenile sentence for the robbery offense and it occurred more than five years prior to the instant offense, the court may not include it in determining the defendant's criminal history category or his career offender status. West Virginia law permits a juvenile to be sentenced in adult court as a juvenile, and the district court

erred when it assumed that his juvenile sentence was an adult sentence simply because he had an adult conviction.

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995). The district court erred by enhancing the defendant's criminal history pursuant to USSG §4A1.1(e) based upon his 24-day incarceration pending a state parole revocation hearing that resulted in neither revocation nor re-incarceration. The defendant pleaded guilty to being a felon in possession of a firearm in 1992. In 1983 he had been convicted of armed robbery in the state of Maryland, and was paroled after serving five years of his nine-year sentence. The state issued a warrant for his arrest for burglary and trespass eight months after his release, but it was not served until 1992, four years after the alleged parole violations and almost a year after the expiration of the parole period. The defendant was held in detention for 24 days pending his parole revocation hearing. Although he was found guilty of the parole violations, the Parole Commission did not revoke parole or reimpose a sentence, and he was released. The federal district court added two points to the defendant's criminal history pursuant to USSG §4A1.1(e) because it considered this detention to constitute "imprisonment on a sentence." The circuit court, however, construed USSG §4A1.1(e) to apply to the defendant only if his pre-revocation detention amounted to an extension or continuation of the original nine-year sentence for his 1983 conviction. The circuit court ruled that there was no basis for holding that the detention amounted to an extension of an original "imprisonment on a sentence" within the meaning of the guidelines, particularly since the defendant's parole was not revoked and the defendant was not re-incarcerated. The circuit court further held that USSG §4A1.1(e) "does not contemplate the assessment of criminal history points on the basis of detentions of defendants who are awaiting parole revocation hearings when those hearings do not result in re-incarceration or revocation of parole." The appellate court vacated the sentence and remanded the case for resentencing.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Bacon, 94 F.3d 158 (4th Cir. 1996). The district court erred in relying upon the defendant's allegation that newly discovered evidence proved his innocence of a prior state offense and in refusing to enhance the defendant's sentence as required under USSG §4B1.1. The court held that the district court was required to count the previous state offense as a predicate offense because the defendant did not allege that he was deprived of counsel or of any other constitutional right. Once a conviction is found to meet the requirements of a predicate offense under USSG §4A1.2, Application Note 6, to this section requires the conviction to be considered unless it has been reversed, vacated or invalidated in a prior case. A defendant may not collaterally attack his prior conviction unless federal or constitutional law provides a basis for such an attack. The court noted that 28 U.S.C. § 994 was enacted to ensure that career offenders received sentences near the maximum term authorized by law and omitted any authority for collateral attacks under this provision. Therefore, the legislature did not intend to give career offenders the right of collateral attack on their prior convictions used for the purpose of sentence enhancement. The court concluded that this particular defendant lacked authority for his collateral attack. As a policy matter, unrestricted challenges to predicate offenses would place a substantial burden upon prosecutors forced to defend the predicate

offenses and judges forced to hear the appeals. The court vacated and remanded the sentence for recalculation characterizing the defendant as a career offender.

United States v. Johnson, 114 F.3d 435 (4th Cir.), *cert. denied*, 522 U.S. 903 (1997). For career offender calculation purposes, the date the prior conviction was sustained should control, not the date of later sentencing as a career offender. The defendant argued that the district court's sentencing of him as a career offender based on his prior conviction for assault on a female, which at the time of the defendant's conviction carried a maximum penalty of two years, could not be used in the career offender analysis because that offense now carries only a 150-day maximum. The defendant argued that North Carolina's recent amendment rendered his prior conviction ineligible for career offender calculations. As a case of first impression for the federal courts, the Fourth Circuit held that the date of the conviction pursuant to USSG §4B1.2(3) of the guidelines provides that the conviction is sustained on the date the guilt of the defendant is established. The defendant sustained his conviction for assault on a female in 1986. In 1986, that offense was punishable by a statutory maximum of two years. Thus, the assault conviction was properly considered a prior felony conviction for guideline purposes.

United States v. Johnson, 246 F.3d 330 (4th Cir.), *cert. denied*, 534 U.S. 884 (2001). The district court did not err in determining that possession of a sawed-off shotgun is a "crime of violence" for purposes of the career offender provisions of USSG §§4B1.1 and 4B1.2. The defendant was convicted of possession of crack with intent to distribute and distribution of crack within 1,000 feet of a public school. His sentence was enhanced by six levels because he met the criteria for a career offender in USSG §4B1.1. The defendant appealed his sentence, arguing that one criterium was not satisfied. Specifically, he asserted that his New Jersey conviction for possession of a sawed-off shotgun was not a crime of violence within the definition in USSG §4B1.2(a) as it did not "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." In determining whether a crime fits the "otherwise clause," the court looks first to the indictment, and if that inquiry is unavailing, it determines whether the crime poses a risk of physical injury in the abstract. In this case, the indictment for the possession offense was not included in the record. The court, therefore, proceeded to the "in-the-abstract" inquiry and determined that the possession of a sawed-off shotgun "always creates a serious potential risk of physical injury to another." 246 F.3d 330 at 335. The court distinguished possession of a sawed-off shotgun from felony possession of a firearm, which the Fourth Circuit has ruled is not a crime of violence. The court agreed with the reasoning of the Seventh, Eighth, and Ninth Circuits that "sawed-off shotguns are 'inherently dangerous and lack usefulness except for violent and criminal purposes,'" and is a markedly different type of weapon. *Id.* at 334 (citations omitted).

United States v. Lawrence, 349 F.3d 724 (4th Cir. 2003). The district court's decision to classify defendant as a *de facto* career offender was affirmed. On appeal, defendant argued that the district court erred in concluding that he was a *de facto* career offender and in upwardly departing on this basis. The Fourth Circuit noted that there were three possibilities a district court could follow when it found that the highest criminal history category, category VI, was inadequate or that the defendant would be considered a career offender, but for the defendant's successful challenge to a predicate offense. First, a district court could exercise its discretion not to depart. Second, a district court could determine the extent of a departure by extrapolating from the existing sentencing table and considering the appropriateness of successively higher

categories level by level. Finally, a sentencing court could, as the district court did in the instant case, directly depart to a sentencing range based on *de facto* career offender status, once the district court determined that a departure under USSG §4A1.3 was warranted and that the defendant's prior criminal conduct was of sufficient seriousness to conclude that he should be treated as a career offender. Furthermore, a district court could sentence a defendant as a *de facto* career offender when he had committed two crimes that would qualify as predicate crimes for career offender status, but for some reason could not be counted. *See United States v. Harrison,* 58 F.3d 115, 118 (4th Cir. 1995). A defendant could also be sentenced as a *de facto* career offender if two of the defendant's prior crimes of violence were consolidated for sentencing purposes and thus did not constitute two separate predicate offenses. *Id.* The court noted that this was the situation in the instant case. Defendant committed two bank robberies on January 14, 1991, which were consolidated for sentencing. These robberies occurred within 53 minutes of each other and were treated as related for sentencing purposes. If the second robbery conviction had not been treated as a related prior sentence, it would have served as the second predicate offense of a felony crime of violence establishing defendant's de jure career offender status. The court noted that the district court had also provided two other independent bases for treating defendant as a *de facto* career offender. First, defendant admitted committing two other bank robberies on January 7, 1991, for which he was never convicted. Second, defendant pled and was convicted for third degree assault for striking a state prison guard. However, the court noted that it did not need to consider these alternative bases for departure, as the district court's treatment of the two 1991 bank robbery convictions was sufficient. Accordingly, the district court's decision to classify defendant as a *de facto* career offender was affirmed.

United States v. Martin, 215 F.3d 470 (4th Cir. 2000). The defendant was indicted for bank robbery, *see* 18 U.S.C. § 2113(b), but was convicted of bank larceny, a lesser included offense. The defendant appealed the district court's order sentencing him as a career offender pursuant to USSG §4B1.1. The appellate court agreed with defendant's contention that bank larceny is not a crime of violence, even in the abstract, and therefore, he was not eligible to be sentenced as a career offender. According to the panel, bank larceny is not one of the qualifying offenses enumerated in USSG §4B1.2(a)(2), nor is it suggested to be a qualifying offense in the accompanying commentary. Moreover, bank larceny does not contain as an element the use, attempted use, or threatened use of physical force. Even assuming, but not deciding, that when a jury convicts a defendant of a lesser included offense, it is permissible for sentencing purposes to consider those facts alleged in the original indictment that correspond to the elements of the lesser included offense, the result does not change. Conforming the indictment to the bank larceny conviction requires deletion of all references to violence. As the appellate court may not consider all the allegations in the indictment, but only those that directly correspond to the elements of the offense of conviction, the defendant's sentence as a career offender was in error.

United States v. Neal, 27 F.3d 90 (4th Cir. 1994). In considering an issue of first impression in the federal courts, the appellate court reversed the district court's sentencing calculation that included a New York state drug possession conviction for purposes of applying USSG §4B1.1, the career offender guideline. Section 4B1.1 requires the defendant to have at least two prior felony convictions for a crime of violence or a controlled substance offense. This court joined the Ninth, Fifth, Tenth and Eleventh Circuits in recognizing that simple possession of drugs is not considered a "controlled substance offense." The New York statute under which the defendant was convicted only required an intent to distribute for one section of the statute;

the other sections pertain to simple possession. Because it was unclear which section of the statute applied to the defendant's convictions, it was improper for the court to count this conviction for purposes of applying the career offender guideline.

United States v. Pierce, 278 F.3d 282 (4th Cir. 2002). The district court did not err in sentencing a defendant as a career offender under USSG §4B1.1. The defendant pled guilty to three counts of bank robbery. At his sentencing hearing, the district court used two prior felony convictions, one for bank robbery and one for taking indecent liberties with a child, to enhance his sentence as a career offender. The defendant appealed the conviction for taking indecent liberties with a child as a "crime of violence" worthy of enhancement under USSG §4B1.1. The Fourth Circuit concluded that the taking indecent liberties with a child was a "crime of violence" because it constituted a forcible sex offense and created a serious potential risk of physical injury. The sentence was affirmed.

United States v. Romary, 246 F.3d 339 (4th Cir. 2001). The district court erred in its determination of the defendant's career offender status under USSG §4B1.1 by not counting a 1987 conviction for breaking and entering for purposes of enhancing the penalty for a 1999 bank robbery conviction. The defendant had two prior felony convictions which met the definition of "crime of violence" for purposes of USSG §4B1.1. *See* USSG §4B1.2(a). Only one of those convictions was challenged as not meeting the requirements of USSG §4B1.1–the 1987 conviction. The original sentence for the 1987 conviction was a ten-year suspended imprisonment with five years of probation. The district court determined that this conviction could not be used in computing criminal history for the following reasons: 1) it was a suspended sentence and did not meet the definition of "sentence of imprisonment" in USSG §4A1.2(b)(2)–definitions and instructions for computing criminal history; 2) it could, therefore, not be included in the USSG §4A1.2(e)(1) criteria that is applicable to "sentence[s] of imprisonment;" and 3) it could not be included under USSG §4A1.2(e)(2), which is applicable to suspended sentences, because it was not "imposed within 10 years," but rather 12 years. The Fourth Circuit held that the district court erred by not considering another basis for including the conviction, namely to consider the reactivated sentence for the 1987 conviction. Reactivation of the original sentence upon revocation of probation in 1992 placed the sentence within the definition in USSG §4A1.2(e)(1) because he was incarcerated and, thus, it became a "sentence of imprisonment." Because the reimposition of the sentence dates back to the original conviction (1987), it still fell within the 15-year period required by USSG §4A1.2(e)(1). In sum, the reactivated sentence fit the requirement of a "sentence of imprisonment . . . *whenever imposed*, that resulted in the defendant being incarcerated during any part of such 15-year period." *See* USSG §4A1.2(e)(1) (emphasis added).

United States v. Stockton, 349 F.3d 755 (4th Cir. 2003). Defendant was charged by a grand jury for various offenses related to his alleged participation in a heroin trafficking conspiracy. The government cross-appealed arguing that the district court erred when it departed downward based on the over-representativeness of defendant's classification as a career offender under USSG §4B1.1. The Fourth Circuit noted that a sentencing court may depart downward where a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that a defendant would commit further crimes. *See* USSG §4A1.3. Therefore, a sentencing court is encouraged to depart downward when a defendant's criminal history category exaggerates the seriousness of his past criminal conduct or

the likelihood that he will commit further crimes. The court noted that the same analysis applied when a defendant urged a sentencing court to find that his classification as a career offender over-represented the seriousness of his actual criminal history or his likelihood of recidivism. In the instant case, defendant committed two serious drug offenses in late 1990 and early 1991, for which he received a combined sentence of 10 years incarceration, all of which was suspended, along with a term of five years' supervised probation. Defendant then proceeded to violate the terms of his probation by unlawfully possessing a handgun in 1994, which resulted in a three-year prison term. Almost immediately upon his release from incarceration, he returned to a life of crime, committing the acts for which the jury convicted him in the instant case. Defendant's criminal history reflected recidivism in controlled substance offenses; under such circumstances, an over-representativeness departure was almost never appropriate. *See United States v. Adkins,* 937 F.2d 947, 952 (4th Cir. 1991) (noting that Congress deemed controlled substance recidivism "especially dangerous").

United States v. Williams, 29 F.3d 172 (4th Cir. 1994). The district court erred in classifying the defendant as a career offender pursuant to USSG §4B1.1. The defendant was involved in and pleaded guilty to a cocaine distribution conspiracy that existed between 1988 and 1989. The district court determined he was a career offender and used as predicate offenses the defendant's convictions for second degree burglary, imposed in September 1991, and attempted burglary, imposed in October 1991. He argued that the predicate offenses were not "prior felony convictions" because they occurred subsequent to the instant offense. The circuit court agreed and held that "convictions sustained subsequent to the conduct forming the basis for the offense at issue cannot be used to enhance a defendant's status to career offender." *See United States v. Bassil*, 932 F.2d 342 (4th Cir. 1991).

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999), *cert. denied*, 529 U.S 1112 (2000). The defendant was convicted of conspiracy to possess marijuana with intent to distribute and aiding and abetting possession with intent to distribute marijuana. The defendant appealed the district court's sentencing him as a career offender. Pursuant to USSG §4B1.1(3), to qualify as a career offender, a defendant must have been convicted of at least two prior felonies of either a crime of violence or a controlled substance. Section 4A1.2(a)(2) provides that prior sentences imposed in unrelated cases are counted separately, but prior sentences imposed in related cases are counted together as a single sentence, such as when they were consolidated for trial or sentencing. Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. *See* USSG §4A.1.2, comment. (n.3). Consequently, the two prior felony convictions properly were considered separate for purposes of qualifying the defendant as a career offender for sentencing purposes.

See United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994), §2K2.1, p. 18.

§4B1.4 Armed Career Criminal

United States v. Cook, 26 F.3d 507 (4th Cir.), *cert. denied*, 513 U.S. 953 (1994). The district court erred in concluding that "obstruction of justice" cannot serve as a predicate offense under the Armed Career Criminal Act when the applicable state law broadly defines it to include violent and nonviolent means. The Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), held that the district court may examine the "indictment or information and jury instructions" to determine whether the burglary for which the jury convicted the defendant was violent. In following the majority of courts of appeals, this court agreed that *Taylor* is not restricted to burglary offenses and may be applied to all predicate convictions. *See United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993), *cert. denied*, 510 U.S. 896 (1993); *United States v. Harris*, 964 F.2d 1234 (1st Cir. 1992); *Lowe v. United States*, 923 F.2d 528 (7th Cir.), *cert. denied*, 490 U.S. 1005 (1989).

United States v. Letterlough, 63 F.3d 332 (4th Cir.), *cert. denied*, 516 U.S. 955 (1995). The appellate court affirmed the district court's enhancement of the defendant's sentence under the provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). The defendant pleaded guilty to being a felon in possession of a firearm, and was sentenced to 84 months imprisonment and five years of supervised release. On appeal the defendant argued that two of his prior convictions were not "committed on occasions different from one other." The two prior felony convictions consisted of two undercover drug sales made on July 31, 1990, to a single undercover police officer. The appellate court ruled that each of the defendant's drug sales was a complete and final transaction, and therefore, an independent offense, noting that Congress intended to include within the scope of the ACCA only those predicate offenses that constitute an occurrence unto themselves. The circuit court recognized and adopted the test applied by the majority of the circuit courts to determine whether the ACCA applies to a defendant's prior crimes: convictions occur on occasions different from one another "if each of the prior convictions arose out of a `separate and distinct criminal episode.'" *United States v. Hudspeth*, 42 F.3d 1015, 1019 (7th Cir. 1994) (*en banc*) (emphasis in original), 63 F.3d 332 at 335, *cert. denied*, 515 U.S. 1105 (1995). The circuit courts have applied a number of factors to determine when more than one conviction constitutes a separate and distinct criminal episode, including "whether the offenses arose in different geographic locations; whether the nature of the offenses was substantively different; and whether the offenses involved multiple victims and multiple criminal objectives." The circuit court found the Fifth Circuit's decision in *United States v. Washington*, 898 F.2d 439 (5th Cir.), *cert. denied*, 498 U.S. 842 (1990), to be particularly instructive because of its similar facts. In *Washington*, the defendant robbed a convenience store and returned to the very same store within a few hours and robbed it again. The Fifth Circuit affirmed the district court's enhancement decision, holding that "where multiple offenses are not part of a continuous course of conduct, they cannot be said to constitute either a criminal spree or a single criminal transaction for purposes of section 924(e)." *Id*. at 441. The circuit court ruled that likewise Letterlough's two convictions did not arise from a continuous course of criminal conduct, but instead constituted two complete and discrete commercial transactions and, therefore two separate and distinct episodes.

United States v. O'Neal, 180 F.3d 115 (4th Cir.), *cert. denied*, 528 U.S. 980 (1999). The district court did not err in sentencing the defendant as an armed career criminal under 18 U.S.C. § 924(e) and USSG §4B1.4. The district court relied on a 1977 North Carolina felony larceny conviction. The defendant argued that the conviction should not count because the government did not include the conviction in the notice it filed with the district court of its intent to seek an

enhanced sentence. The appellate court concluded that the presentence report gave the defendant adequate notice that the 1977 conviction was a possible predicate conviction. The appellate court stated that "there is no requirement that the government list, either in the indictment or in some formal notice the predicate convictions on which it will rely for a section 924(e) enhancement. *See United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992), *cert. denied*, 507 U.S. 977 (1993). The appellate court added that although the defendant has a right to adequate notice of the government's plan to seek such an enhancement, the listing of these convictions in the presentence report is more than adequate to provide such notice." Because the presentence report explicitly relied on the 1977 conviction as a possible predicate for subjecting the defendant to an enhanced sentence, the defendant received adequate notice.

§4B1.5 Repeat and Dangerous Sex Offender Against Minors[14]

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.4 Recommended Conditions of Probation and Supervised Release (Policy Statement)

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996). The district court did not abuse its discretion in ordering the defendant to abstain from alcohol as a condition of supervised release. Pointing to *United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992), the defendant contended that this condition deprived him of his liberty and freedom, and was not "fine tuned" as such restrictions on freedom should be. The circuit court distinguished this case, however, by indicating that the defendant in *Prendergast* did not have a history of alcohol abuse, while the defendant in this case has prior convictions for alcohol related offenses and had tested positive for drugs on various occasions. The circuit court joined with the First and Ninth Circuits in holding that this condition of supervised release was acceptable under such circumstances.

[14]Effective November 1, 2001, the Commission created a new guideline (§4B1.5) that aims to incapacitate repeat child sex offenders who have an instant offense of conviction of sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor (but to whom §4B1.1 does not apply). The new guideline also provides a five-level increase in the offense level and a minimum offense level of 22 for defendants who are not subject to either §4B1.1 or to §4B1.5(a) and who have engaged in a pattern of activity involving prohibited sexual conduct with minors. *See* USSG App. C., Amendment 615. Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline. *See* USSG, App. C, Amendment 649.

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Ivester, 75 F.3d 182 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court found that the defendant had failed to provide the government with any truthful information concerning his crime. The defendant contends that he is entitled to the departure because he would have provided truthful information to the government had it asked for any. On appeal, the defendant raised an issue of statutory construction that had not been decided by any circuit court: whether pursuant to section 3553(f), defendants are required to affirmatively act to inform the government of their crimes, or whether it is sufficient that they are willing to be completely truthful. Although noting that a defendant cannot be denied section 3553(f) relief merely because the information provided to the government is not useful, the court determined that granting a section 3553(f) relief to defendants who are merely willing to be completely truthful would obviate the statutory requirement that defendants "provide" information. Therefore, defendants seeking to avail themselves of downward departures under USSG §5C1.2 bear the burden of affirmatively acting to ensure that the government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Alalade, 204 F.3d 536 (4th Cir.), *cert. denied*, 530 U.S. 1269 (2000). The appellate court held that the district court had no discretion under the Mandatory Victims Restitution Act of 1996 (MVRA) to order the defendant to pay restitution in an amount less than the full amount of each victim's loss by allowing an offset for the value of fraudulently obtained property the government seized from the defendant and retained in administrative forfeiture. The defendant obtained $667,858.18 from various financial institutions through credit card fraud, and pled guilty to one count of credit card fraud. The government ultimately seized and retained $78,982.02 worth of items from the defendant in an administrative forfeiture. The district court ordered the defendant to pay restitution in the amount of $667,858.18. The defendant appealed, arguing that the restitution amount should be offset by the $78,982.02 seized by the government. The defendant relied upon pre-MVRA case law holding that the district court has discretion to reduce the amount of restitution by amounts seized from the defendant in forfeiture proceedings. *See United States v. Khan*, 53 F.3d 507 (2d Cir. 1995). The appellate court examined the MVRA, and concluded that the Act does not grant the district court discretion to reduce the amount of restitution required to be ordered by an amount equal to the value of property seized by the government in administrative forfeiture. The appellate court noted that with the passage of the MVRA, Congress completely deleted the language of the Victim and Witness Protection Act affording the district court discretion in cases such as this to consider any factor it deemed appropriate in determining the amount of restitution to be ordered. The MVRA requires the district court to order restitution to each victim in the full amount of each victim's losses as determined by the district court. Thus, the appellate court held that the

district court lacked discretion under the MVRA to offset the restitution amount by the value of the items seized by the government.

United States v. Dawkins, 202 F.3d 711 (4th Cir.), *cert. denied*, 529 U.S. 1121 (2000). The appellate court vacated the defendant's restitution amount because the amount of restitution depends on the amount of loss, which the district court was ordered to recalculate. The appellate court did address the defendant's challenges to the restitution order to guide the district court on remand. The district court ordered the defendant to pay restitution in the full amount of the loss and a $200 special assessment, and stated that both were immediately due and payable in full. The district court also instructed that if the defendant is unable to pay restitution owed immediately, restitution shall be paid in installments of $200 dollars per month to begin 60 days after the defendant's release from prison. Furthermore, the probation officer shall take into consideration the defendant's economic status as it pertains to his ability to pay restitution ordered and shall notify the court of any changes that need to be made to the payment schedule. The appellate court rejected the defendant's argument that the district court did not satisfy its statutory obligations to specify the manner and schedule by which he was ordered to pay restitution because the court ordered the entire restitution amount immediately due. The appellate court concluded that the district court effectively discharged its responsibility to set a payment schedule when it instructed that if the defendant were unable to pay the full restitution amount immediately, he could pay 60 days after his release.

However, the appellate court did hold that the district court must make a finding that "keys Dawkins' financial situation to the restitution schedule ordered or finds that the order is feasible." The MVRA clearly requires a sentencing court to consider the factors listed in 18 U.S.C. § 3664(f)(2) and the court must make a factual finding keying the statutory factors to the type and manner of restituiton ordered. The appellate court concluded that the record is devoid of any factual finding that keys the defendants financial situation to the restitution ordered or finds that the restitution order is feasible. Thus, when the district court reconsiders the restitution order on remand, it must make such a finding on the record.

The appellate court concluded that the district court did not illegally delegate its judicial authority by allowing the probation officer to adust the restitution payment schedule after considering the defendant's economic status. The appellate court noted that a district court may not delegate to the probation officer the final authority to establish the amount of defendant's partial payment of either restitution. *See United States v. Miller*, 77 F.3d 71 (4th Cir. 1996); *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995). Here, the district court ordered the probation officer to take Dawkins financial situation into consideration and "notify the Court of any changes that may need to be made to the payment schedule." The appellate court concluded that the court retained both the right to review the probation officer's findings and to exercise ultimate authority regarding the payment of restitution; therefore, the court did not illegally delegate its authority.

United States v. Ubakanma, 215 F.3d 421 (4th Cir. 2000). The defendants pleaded guilty to wire fraud. One defendant appealed his restitution order. The appellate court reviewed the restitution order for plain error as the issue was not preserved at the sentencing hearing. Pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663, a court may order restitution only to victims of an offense for losses traceable to the offense of conviction. The court must also consider various other factors, including the amount of loss sustained by the

victim. As the court failed to make a finding as to the actual losses suffered by the victims of the offense, a remand for resentencing was required.

§5E1.2 Fines for Individual Defendants

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 516 U.S. 840 (1995). The government challenged the district court's decision not to impose a fine on the defendant under USSG §5E1.2. The Fourth Circuit held that the district court must determine whether the defendant has proved his present and prospective inability to pay a fine, and remanded the case for reconsideration of the defendant's financial situation. The appellate court relied on §5E1.2(a) which states, "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." The appellate court stated that "the defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition."

United States v. Hong, 242 F.3d 528 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001). The district court erred when it vacated a fine that was consistent with the government's interpretation of USSG §5E1.2(c)(4), that the statute of conviction's maximum fine was alterable by the alternative fine statute, 18 U.S.C. § 3571. The defendant was convicted of one count of "failing to properly maintain and operate a treatment system and with 12 counts of discharging untreated waste water." *See* 33 U.S.C. § 1319(c)(1)(A). In vacating a fine of $1.3 million, the district court held that the maximum fine under section 1319 was $25,000 per day of violation and therefore no more than $300,000 for 12 counts. The district court reached this conclusion by interpreting the language of USSG §5E1.2(c)(3) and (4). Section 5E1.2(c)(3) is a table of the applicable fines, which sets the maximum fine possible at $250,000. However, this maximum is not applicable if "the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute." USSG §5E1.2(c)(4). The district court agreed with the defendant's argument that USSG §5E1.2(c)(4) directed the court to look to the maximum penalty allowable under the statute of conviction, in this case $300,000–$25,000 for each of the 12 counts. The government, on the other hand, understood the exception in USSG §5E1.2(c)(4) "as a directive that the guidelines do not provide any maximum fine when the statute of conviction authorizes a fine per day of violation." 242 F.3d at 533. Under this interpretation, USSG §5E1.2(c)(4) does not require the application of the maximum fine provisions in the *statute of conviction*, but also allows *other statutes to apply by reference*. The support for this interpretation is found in Application Note 5, which states that "[s]ubsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases." USSG §5E1.2, comment(n.5). The Alternative Fine Statute, section 3571 of the Federal Criminal Code, also imposes maximum fines. Subsection (e) provides that when a statute of conviction does not impose a fine, or imposes one lower than the fine under section 3571, the statute of conviction has to exempt application of section 3571 by specific reference in order for its maximum to stand. The government argued, and the court agreed, that since the statute of conviction did not specifically exempt application of section 3571, the maximum fine under the alternative fine statute should apply–$100,000 per count. *See* 18 U.S.C. § 3571(b)(5).

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The district court did not abuse its discretion in imposing a $300,000 fine. The defendant refused to complete a personal financial statement for the presentence report and provided no evidence to show an inability to pay. The defendant bears the burden of demonstrating his present and future inability to pay. *United States v. Hairston*, 46 F.3d 361, 367 (4th Cir.), *cert. denied*, 516 U.S. 840 (1995).

§5E1.4 Forfeiture

United States v. Najjar, 300 F.3d 466 (4th Cir.), *cert. denied*, 537 U.S. 1094 (2002). The defendants, Basem Najjar and Tri-City Auto Outlet, were convicted on money laundering and RICO violations arising from the operation of a theft and chop shop ring. In addition to a sentence of 132 months imprisonment for Najjar, the district court ordered the defendants to pay restitution and forfeit $2,760,000 in cash and assets. The defendants appealed the forfeiture amount, arguing that it was in violation of *Apprendi v. New Jersey*, and constituted an excessive fine in violation of the Eighth Amendment. The court of appeals held that RICO forfeitures do not increase penalties beyond the statutory maximum. Further, forfeitures are part of the punishment and sentencing determination. Thus, forfeiture issues need not be submitted to jury. The court also held that the forfeiture amount was not excessive in light of the serious conspiracy.

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995). The defendant's sentence was vacated and remanded to the district court to apply USSG §5G1.3, where it was not clear from the record or the sentencing order whether the 46-month sentence was imposed to run concurrently or consecutively to the defendant's undischarged state sentence.

United States v. Mosley, 200 F.3d 218 (4th Cir. 1999). The appellate court held that when using the 1995 or later editions of the sentencing guideline dealing with the imposition of a sentence on a defendant who is subject to an undischarged term of imprisonment, the district court is not required to calculate a hypothetical combined guideline range. Instead, a sentencing court need only consider the relevant factors that USSG §5G1.3(c) directs the court to consider. The defendant pled guilty to conspiring to distribute cocaine. The district court decided to run 48 months of his 72-month sentence consecutively to an undischarged term of imprisonment. The defendant appealed, arguing that under the current version of USSG §5G1.3(c), the district court was required to add together the drug weights from the current offense and from the prior offense in order to create a hypothetical combined guideline range that would have applied if he had been sentenced for both offenses simultaneously. Had the district court created a hypothetical combined guideline range for both crimes, his sentence would have been at least 34 months less. The appellate court rejected the defendant's argument, finding that nowhere in the current USSG §5G1.3(c) is there a requirement that a district court must fashion a hypothetical combined guideline range for a defendant with a prior undischarged term of imprisonment and sentence him within that range. Prior to 1995, the Fourth Circuit had required district courts to

create a hypothetical combined guideline range for a defendant and sentence the defendant within that range. *See United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995). However, USSG §5G1.3 was amended in 1995 (Amendment 535) and now only requires courts to engage in a factor analysis before deciding whether to impose a sentence that is concurrent with, partially concurrent with, or consecutive to a prior undischarged term of imprisonment. The appellate court noted that Amendment 535 specifically states that its purpose in regard to USSG §5G1.3(c) is to afford the sentencing court additional flexibility to impose the sentence. Thus, the district court did not have to calculate a hypothetical guideline range, and the appellate court affirmed the defendant's sentence.

United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995). The district court did not err by ordering that the defendant's sentence for the instant offense run consecutively to his parole revocation sentence. The defendant unsuccessfully argued to have the present sentence run concurrently with his 1988 PCP sentence. Under USSG §5G1.3(c), the court must attempt to calculate the reasonable incremental punishment . . . under the commentary methodology, but may use another method if there is a reason to abandon the suggested penalty. In addition, the circuit court noted that Application Note 5 of USSG §7B1.3 states: ". . . any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant." The circuit court found that although the district court did not specifically state that it was applying either USSG §5G1.3(c) or USSG §7B1.3, its reasoning indicates that the appropriate factors were considered under the relevant guidelines. Furthermore, the district court listed several factors that formed the basis of its decision to have the present sentence run consecutively, including the frequency of the defendant's drug convictions, the severity of his PCP offense, and the court's desire not to minimize the punishments for two different, unrelated drug offenses.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court erred in relying upon Application Note 5 of USSG §5G1.3 to impose the statutory maximum term for solicitation on the defendant. The court of appeals held that the district court erroneously interpreted Note 5 to allow the imposition of the statutory maximum. Note 5, however, simply addresses the imposition of concurrent or consecutive terms of imprisonment when the defendant is faced with numerous terms of undischarged prison time. Nothing in Note 5 allows the district court to depart from the applicable guideline range. The court of appeals remanded for resentencing on this count.

Part H Specific Offender Characteristics

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)[15]

United States v. Carr, 271 F.3d 172 (4th Cir. 2001). The Fourth Circuit dismissed a defendant's appeal after the district court refused to grant him a downward departure based on his physical impairment, AIDS. The defendant pled guilty to maliciously damaging and destroying a building used in interstate commerce by means of fire, 18 U.S.C. § 844(i), conspiracy to commit mail fraud, 18 U.S.C. § 371, and bank fraud, 18 U.S.C. § 1344. The court found that the district court's refusal to depart was not subject to appellate review because there was no misperception as to its authority to do so. The district court ruled that the impairment was not so extraordinary as to warrant departure under USSG §5H1.4 and agreed with the Government's contention that the prison system could sufficiently handle the defendant's illness.

§5H1.6 Family Ties and Responsibilities (Policy Statement)[16]

United States v. Wilson, 114 F.3d 429 (4th Cir. 1997). The district court abused its discretion in departing downward from the applicable guideline range. The defendant pled guilty to conspiracy to possess with the intent to distribute cocaine base. The district court held that the defendant was not entitled to a reduction in his sentence under USSG §2D1.1(b)(4) because the defendant had failed to carry his burden of demonstrating that the firearms he admitted to possessing were not possessed in connection with the conspiracy. The district court, however, did depart downward from the resulting guideline range because of the defendant's extraordinary family responsibilities. The government appealed, arguing that the district court abused its discretion in granting the downward departure. The circuit court applied the analysis of *Koon v. United States*, 518 U.S. 81 (1996), and agreed and held that a fair review of the proceedings before the district court demonstrated that the defendant's deprived background was a motivating force behind the decision of the district court to depart. The district court, recognizing that USSG §5H1.12 prohibited a departure based on disadvantaged upbringing, attempted to justify the departure USSG §5H1.6, based on family ties and the defendant's ability to take care of his own children. The circuit court found that the defendant's family circumstances were not so extraordinary as to justify the departure. The circuit court found that the district court improperly departed, and vacated the sentence and remanded for resentencing.

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[15]Effective October 27, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline by adding a prohibition against departures based on addiction to gambling. *See* USSG, App. C, Amendment 651.

[16]Effective April 30, 2003, section 401(b)(5) of Pub. L. 108-21 (PROTECT Act) directly amended this policy statement to add the second paragraph. *See* USSG, App. C, Amendment 649. The Commission also deleted Communities Ties from §5H1.6.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Brock, 108 F.3d 31 (4th Cir. 1997). The district court erred in finding that it lacked the authority to consider a departure. At sentencing, the defendant sought a departure based on his post-offense rehabilitation efforts. *See* USSG §3E1.1, comment. (n.1(g)) (stating that post-offense rehabilitation efforts should be taken into consideration in determining whether to grant acceptance of responsibility adjustment). The circuit court found that based on the analysis set forth in *Koon v. United States*, 518 U.S. 81 (1996), post-offense rehabilitation efforts could form a proper basis for downward departure. Noting that post-offense rehabilitation efforts are taken into account in acceptance of responsibility determinations, the court stated that such efforts could be a basis for a departure only "when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted."

United States v. Butler, 272 F.3d 683 (4th Cir. 2001). The Fourth Circuit affirmed the decision of the district court, sentencing the defendant to 161 months of imprisonment, and rejecting his argument that the district court should have compelled the government to file a downward departure motion on his behalf. The defendant claimed that under 18 U.S.C.§ 3553(e) and USSG §5K1.1, due to his substantial assistance, he was entitled to a downward departure. While the defendant provided the government with substantial assistance in the investigation and prosecution of a bank robbery, he had also threatened the life of a codefendant, causing the government's refusal to file a downward departure motion for him. The Fourth Circuit stated that under 18 U.S.C. § 3533(e) and USSG §5K1.1, district courts are permitted to "impose a sentence below the statutory minimum 'to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense," but the granting of such a sentence is a power, not a duty provided by the government. The defendant contended that the government's reason for refusing not to file the motion was not rationally related to a legitimate government end and was not related to the assistance he provided. The defendant also argued that he received disparate treatment from that received by his similarly situated co-defendants as further evidence that the government's refusal to file was not rationally related to a government interest.

The Fourth Circuit held that the refusal was rationally related to a government interest because of three reasons: (1) the threats the defendant issued to his codefendants were rationally related to the type and quality of assistance he rendered; (2) even if the threats were not rationally related to the assistance he provided, it is not a relevant inquiry under *Wade v. United States*, 504 U.S. 181 (1992); and (3) the defendant's allegation of disparate treatment is legally irrelevant and factually incorrect. According to the court, "a defendant is not rendering 'substantial assistance' if he is threatening the life of another government witness before his sentencing hearing." Thus, the Fourth Circuit found that the district court properly denied the motion to compel and to depart downward.

United States v. Hill, 70 F.3d 321 (4th Cir. 1995). The defendant appealed the extent of the downward departure based on his substantial assistance to the government. He asserted that

the district court's decision to reduce his base offense level by only two levels was based on its erroneous consideration of a prison term imposed on him by the district court in Texas. The appellate court concluded that the sentence did not result from an incorrect application of the guidelines, and the appeal was an artful attempt to gain review of the district court's exercise of discretion. As such, the appeal was dismissed.

United States v. LeRose, 219 F.3d 335 (4th Cir. 2000). The defendant pleaded guilty to executing, aiding, and abetting a scheme and artifice to defraud a federal institution, and to filing a false income tax return. The government appealed the district court's imposition of a downward departure. The district court departed because it determined that the loss, $3,364,958, overstated the seriousness of the offense in that the victim of the offense–a bank–delayed in confronting the defendant as to the offense conduct, and that the defendant was entitled to a reduction for substantial assistance even though the government declined to make the appropriate motion. Absent a determination of an unconstitutional or irrational motive on the part of the government, it was error for a district court to grant a reduction for substantial assistance without a government motion. *See United States v. Schaefer*, 120 F.3d 505, 508 (4th Cir. 1997). The burden is on the defendant to make a substantial threshold showing that the government's refusal resulted from improper or suspect motives. *See Wade v. United States*, 504 U.S. 181, 186 (1992). In the instant case, the district court impermissibly shifted to the hearing portion of the *Wade* framework without first determining whether the defendant had met his threshold burden. When a defendant does not demonstrate an improper refusal by the government, the inquiry must come to an end. As a result, the departure was in error.

United States v. Pearce, 191 F.3d 488 (4th Cir. 1999). A district court's discretion to depart under USSG §5K1.1 is "broad" but limited in two ways: (1) the factors it considers must relate to "the nature, extent and significance of the defendant's assistance"; (2) the extent of any departure must be "reasonable." The defendants were career offenders who pled guilty to conspiracy to purchase cocaine. The district court erroneously held that once the government files a USSG §5K1.1 motion, the court has "total discretion." It then rejected the government's request for a three-level downward departure for each defendant and departed downward from an offense level of 26 to 2 for defendant Pearce, notwithstanding that his substantial assistance was limited to his participation in a single controlled narcotics purchase that was set up by defendant Chapman. Similarly, it lowered Chapman's offense level from 26 to 6 based upon his participation in one controlled purchase and his setting up the second purchase for Pearce. The Fourth Circuit reversed and remanded both cases for resentencing. With respect to Pearce, it noted that while the district court did not articulate the specific reasons for its departure, the counsels' arguments and evidence indicate that it apparently considered irrelevant factors; failed to give substantial weight to the government's evaluation; failed to give its reasons for departing; and based on the record, departed to an unreasonable extent. With respect to Chapman, the district court considered appropriate factors, but the 20-level departure was "unreasonable in extent" given his level of cooperation.

United States v. Pillow, 191 F.3d 403 (4th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000). In a 2 to1 decision, the Fourth Circuit determined that the starting point for calculating a downward departure under USSG §5K1.1 and 18 U.S.C. § 3553(e) was the statutory minimum sentence–not what the guidelines would be absent the statutory minimum sentence. The defendant had been convicted by a jury of narcotics charges and was sentenced to the statutory

minimum sentence pursuant to USSG §5G1.1. Thereafter, the government filed a §5K1.1 motion based upon the defendant's subsequent cooperation. The Fourth Circuit rejected the defendant's contention that section 3553(e) restored the otherwise applicable guideline range that would have applied absent the mandatory minimum sentence because the plain language of the statute "allows for a departure from, not the removal of, a statutorily required minimum sentence." Specifically, section 3553(e) provides for a sentence "below" a statutorily required minimum sentence (*i.e.*, a departure). In contrast, section 3553(f) (relating to the "safety valve") provides for a sentence "without regard" to any statutorily required minimum sentence. In dissent, Senior Judge Butzner noted that USSG §5K1.1 permits departure "from the guidelines" and that the low end of "the guidelines" was 188 months.

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The circuit court did not err in refusing defendant's request to depart downward under USSG §5K1.1 based on the defendant's "substantial assistance" in order to enforce his plea agreement with the government. A court may not grant such a departure without a government motion unless 1) the government obligated itself in the plea agreement or 2) the refusal to make the motion was based on an unconstitutional motive. The plea agreement provided the government with the discretion to make such a motion if it determined it was warranted, but did not impose a binding obligation to do so. Nor was the refusal to move for departure based on unconstitutional racial bias. The only support for this claim offered by the defendant was the allegation that the same United States Attorney's office recently moved for downward departure on behalf of several middle class white defendants convicted of comparable drug offenses. The circuit court held that this alone was not sufficient to reach judicial inquiry under *United States v. Wade*, 504 U.S. 181 (1992) (defendant must make a "substantial threshold showing" of unconstitutional motive).

§5K2.0 Grounds for Departure (Policy Statement)[17]

United States v. Bailey, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 522 U.S. 896 (1997). The district court properly departed upward from the standard guideline sentence for kidnapping. The district court found four aggravating factors which it used to justify the upward departures and the defendant's increased sentence including §§5K2.2 (physical injury), 5K2.8 (extreme conduct), 5K2.5 (property damage), and 5K2.4 (abduction or unlawful restraint). The defendant argued that the extent of the departures made by the district court were unreasonable because certain facts the district court relied upon were erroneous. The defendant objected to the consideration of §5K2.2 as a ground for departure because §2A4.1(b)(2) of the guidelines under kidnapping provides for a four-level increase if the victim sustained permanent or life-threatening bodily injury. The Fourth Circuit, applying the standard of review established by the Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996),[18] rejected this argument and held that the extent of the upward departure should ordinarily depend on the extent of the injury, the degree to which it may prove to be permanent, and the extent to which the injury was intended.

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[17]Effective April 30, 2003, the Commission, in response to a congressional directive under the Child Protect Act, Pub. L. 108-21, added language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. The appellate standard of review also has been amended effective April 30, 2003, by the PROTECT Act, 18 U.S.C. § 3472(e). *See* USSG App. C, Amendment 649.

[18]*Id*.

When the victim suffers a major permanent disability, and when such an injury was intentionally inflicted, a substantial departure may be appropriate. Similarly, the defendant objected to the use of USSG §5K2.4 because the crimes of kidnapping and domestic violence contain the elements of abduction and unlawful restraint and thus, an additional departure would not be authorized. The circuit court held that because of the egregious nature of the restraint in this case, being held captive in the trunk of a car for an extended period of time, a departure based on USSG §5K2.2 and 5K2.5 was completely reasonable. Additionally, the defendant argued that a departure under USSG §5K2.5 was erroneous because the four-level adjustment for a permanent or life-threatening bodily injury mentioned in USSG §2A4.1(b)(2) obviated the use of USSG §5K2.5 because in every case involving serious injury, there will always be significant medical expenses. The district court rejected this argument and held that the district court correctly referred to USSG §5K2.5 due to the massive future medical expenses involved. Lastly, the defendant argued that the use of USSG §5K2.8 was unwarranted because the facts underlying the finding of extreme conduct were erroneous. The circuit court rejected this argument, holding that even in the light most favorable to the defendant, the defendant's conduct was intentionally brutish, cruel, and extreme.

United States v. Fenner,147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998). The district court properly concluded it could not base a downward departure on the increase in sentencing range that resulted from application of a cross-reference. The defendants had been charged with and acquitted of the murder of a co-conspirator in a drug distribution conspiracy. They were later convicted on federal drug and firearms charges. At sentencing, the district court found that they were responsible for the murder and applied the cross-reference to the homicide guidelines contained in USSG §2K2.1(c)(1)(B). The district court ruled that although application of the cross-reference resulted in rather large enhancements of the guideline ranges, it lacked authority to depart downward. The defendants argued that under *Koon v. United States*, 518 U.S. 81 (1996), enhancement of a sentencing range through application of a cross-reference is not a prohibited basis for departure, therefore the district court possesses the authority to depart on that basis. The court of appeals viewed the enhancement resulting from application of a cross-reference as an unmentioned departure factor, and went on to determine whether the enhancement is taken into account within the heartland of the applicable guidelines. The language of the cross-reference plainly indicates that when a firearm is illegally possessed in connection with another offense from which death results, the sentencing court must enhance the defendant’s sentence in accordance with the homicide guidelines if that sentence is greater than that calculated without reference to the homicide guidelines. Thus, the guidelines take into account that the application of the cross-reference will result in an enhanced guideline range.

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997). The district court abused its discretion in granting a downward departure based on the defendant's "extraordinary restitution." The defendant, through the generosity of friends, repaid the bank she had embezzled $250,000 to settle her civil liability. The district court determined that her efforts merited a five-level departure for "extraordinary restitution." The government appealed, arguing that the defendant's restitution was not "extraordinary." The circuit court stated that the standard of review for departure cases is now a "unitary abuse of discretion standard." *Koon v. United States*, 518 U.S. 81 (1996). The circuit court concluded that because the guidelines already take restitution into consideration in the context of a sentence reduction for acceptance of responsibility, restitution is a discouraged factor that can support a departure

only if the restitution in a particular case demonstrates an extraordinary acceptance of responsibility. *See United States v. Hendrickson*, 22 F.3d 170 (7th Cir.), *cert. denied*, 513 U.S. 878 (1994). Here, the court found that the defendant's restitution was not extraordinary as it equaled less than half the amount she embezzled and came not from her funds, but from the generosity of friends. Therefore, when compared to the efforts of defendant's in other cases, the district court abused its discretion in finding that the circumstances merited departure.

United States v. Matthews, 209 F.3d 338 (4th Cir.), *cert. denied*, 531 U.S. 910 (2000). The defendant pleaded guilty to one count of receiving child pornography and one count of transmitting child pornography. The defendant argued the district court clearly erred in the factual findings that formed the basis for its refusal to grant a downward departure from the applicable sentencing range given the defendant's contention that his trafficking in child pornography solely was for a journalistic purpose. Moreover, defendant contended that the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), overruled Fourth Circuit precedent that held as unreviewable district court refusals to downwardly depart. The appellate court noted that prior to *Koon*, the Fourth Circuit had joined seven other circuits in ruling that the factual findings underlying a district court's refusal to depart downward could be reviewed only when the district court was under the mistaken impression that it lacked the authority to depart. As *Koon* addressed the issue of the appropriate standard of review to be applied to a district court's decision to depart, and not the review of a district court's decision not to depart, *Koon* did not overrule circuit precedent.

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995). The defendants pleaded guilty to carjacking and use of a firearm. They repeatedly beat and raped their victim. The district court departed upward based on the "extensive psychological effect" of the crime on the victim, USSG §5K2.3, the extreme conduct in inflicting gratuitous pain, USSG §5K2.8, and the physical injury to the victim, USSG §5K2.2. The appellate court agreed with the defendants that the district court erred in departing for physical injury because it was taken into account under USSG §2B3.1(b)(3)(C) in determining the guideline range, and the district court made no finding that that adjustment was not sufficient. However, the appellate court was convinced that the district court's reliance on this ground did not affect the sentence imposed. The "reliance on physical harm as a factor in the upward departure decision was harmless."

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). The district court erred in granting a downward departure to the defendant. At sentencing, the defendant was granted a downward departure from the applicable guidelines range of 292 months to 240 months, based on three justifications: comparatively lenient treatment of similarly culpable codefendants; unwarranted racial disparity in sentencing stemming from the fact that most of the codefendants are white and the defendant is black; and a shorter sentence more accurately reflects the defendant's relative culpability. The Government appealed the departure. Disparate sentences among codefendants is not a permissible ground for departure. *See United States v. Withers*, 100 F.3d 1142, 1149 n.3 (4th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997) (noting unanimous agreement that such departures are impermissible among circuits which have addressed the issue). With respect to the racial disparity claim, the circuit court stated that race can never be a basis for a departure. *United States v. Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996); §5H1.10. As for a departure based on "relative culpability," the circuit court dismissed this argument stating that such departures would circumvent the district court's factual determinations. The sentence

was vacated and the case was remanded to the district court for resentencing within the applicable guideline range.

United States v. Pitts, 176 F.3d 239 (4th Cir.), *cert. denied*, 528 U.S. 911 (1999). The district court did not err in departing upward one level based upon the district court's finding that the defendant's abuse of trust was extraordinary. The defendant was an FBI agent who sold confidential information to Russia. The district court applied the two-level abuse of trust enhancement pursuant to USSG §3B1.3, and then departed upward one level for extraordinary abuse of trust. The defendant appealed the upward departure, arguing that because he was no more culpable than other counterintelligence or supervisory agents who hold similar positions and who may also commit crimes, a departure was unwarranted. The appellate court stated that an upward departure based upon an extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland of cases that qualify for the enhancement. Here, the level of trust placed in the defendant was unmatched. He was a supervisory special agent of the FBI and a foreign counterintelligence operative whose job was to thwart the espionage activities of the very foreign intelligence service with whom he conspired. In violating, that "awesome responsibility and trust," the defendant violated a level of trust to which most men are never exposed. The defendant presented several other espionage cases where more harm followed in which the sentencing court did not depart based upon abuse of trust. The appellate court rejected this reasoning, concluding that the harm resulting from the actual offense is irrelevant to a decision to depart based upon an extraordinary abuse of trust. The relevant harm is the harm created by the violation of trust.

United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996). The Fourth Circuit, using a five-part test, found that none of the six factors underlying the district court's decision justified a departure and, thus, concluded that the district court abused its discretion in granting a five-level departure. The district court had departed downward based on a combination of factors, and the government appealed the departure. The circuit court prescribed the following analysis for sentencing courts to follow when deciding whether to depart, and clarified the standards for review of departure decisions: (1) The district court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed for clear error. (2) The district court must decide if the circumstances appear "atypical" and potentially take the case out of the heartland. This is purely analytical and never subject to appellate review. (3) The district court must classify each factor as "forbidden, encouraged, discouraged, or unmentioned." This is a matter of guideline interpretation and reviewed de novo in the context of the ultimate review for abuse of discretion. (4) Factors that are "encouraged, discouraged, or unmentioned" require further analysis. Encouraged factors, if not taken into account by the guidelines, are usually appropriate bases for departure. Discouraged factors are an appropriate basis for departure only in exceptional cases. Unmentioned factors may justify a departure if the factor takes the case outside the guideline's heartland. (5) The district court must consider whether the circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure is warranted. The circuit court, relying on this analysis, held that none of the factors underlying the district court's decision justified a departure and concluded that the court abused its discretion in granting a five-level departure. The court held: 1) the defendant's alcohol problem was a forbidden basis for downward departure; 2) the defendant's 20 years of unblemished service to the United States,

nor responsibilities to his wife and son, who had medical problems, provided bases for a departure downward; 3) the district court committed legal error when it departed downward on the ground that the defendant did not commit serious fraud; 4) determination that all law officers suffer disproportionate problems when incarcerated was not proper basis for departure; and 5) finding that the defendant's status as a convicted felon was sufficient punishment was not proper basis for downward departure.

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996). The district court erred in departing downward based on the defendant's exposure to civil forfeiture. The defendant was convicted of submitting fraudulent claims to Medicaid and Medicare. Under the plea agreement, the defendant was to pay restitution of $545,000. However, in a consent judgment in a civil forfeiture action, the defendant agreed to forfeit over $600,000 which was credited against the restitution in the plea agreement. The district court departed downward under USSG §5K2.0 because the defendant had payed a sum "beyond" complete restitution. The circuit court reversed, holding that exposure to civil forfeiture is not a basis for a downward departure. The court noted that forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment. Additionally, civil forfeiture actions do not suggest any reduced culpability or contrition on the part of a defendant that might warrant a sentence reduction. The circuit court concluded that the district court's departure was an error of law and therefore, an abuse of discretion.

§5K2.1 Death (Policy Statement)

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). On appeal by the government, the appellate court vacated the defendant's sentence after a finding that the lower court erred in granting the defendant a departure based on impermissible factors. The defendant argued that his departures were warranted because of the cocaine and crack sentencing disparity in the United States sentencing guidelines and the fact that his white codefendants received lower sentences. The appellate court disagreed, and held that a district court cannot depart from an applicable guideline range based on its own sense of justice. Applying the abuse of discretion standard set forth in *Koon v. United States*, 518 U.S. 81 (1996), the appellate court held that under the law of the Fourth Circuit, disparate sentences among codefendants was not a viable ground for departure. Similarly, racial disparity in sentencing and relative culpability were simply different ways of justifying the district court's desire to equate the defendant's sentence with those of his codefendants. It was determined by the lower court that the defendant was actually the leader of the drug selling enterprise. Ultimately, these factors contributed to the defendant's total offense level and aided in the judge's determination of the applicable guideline range. The appellate court further noted that departures based on relative culpability would allow district courts to ignore their own factual determinations.

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The district court abused its discretion by departing upward four levels in determining the defendant's sentence for two counts of reckless involuntary manslaughter and an additional uncharged death. The circuit court held that the additional uncharged death of a participant in the aggressive driving could provide a basis for upward departure, even though that victim had been "an active participant in the activity that resulted in his death." However, the sentencing court erred by failing to make additional findings of fact to support the extent of the departure. The court noted that the

defendant would have received a one-level increase for the third death under the sentencing guidelines' grouping rules. *See* §3D1.4. The guidelines provide that the extent of an upward departure for death "should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury." The circuit court noted that the sentencing court failed to make findings as to the defendant's state of mind. "Accordingly, the extent of the district court's departure turns on whether the recklessness exhibited by the defendant was adequate to establish the existence of malice. Because the district court made no such findings, we remand."

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court did not err in departing upward based on the murder of the victim in a kidnaping case. The court of appeals held that, unless USSG §2A4.1 of the 1990 guidelines takes into account the death of the kidnaping victim as occurred in the instant case, the court could upwardly depart based on USSG §5K2.1. The guideline specifically provides for other circumstances such as holding the victim for ransom or with a deadly weapon or for a prolonged period. It also provides an adjustment if the kidnaping was done to facilitate the commission of another offense. In this case, however, the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to murder her. The guideline does not take into account this scenario. Therefore, an upward departure to life imprisonment based on the victim's death was not an abuse of discretion.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The defendant was convicted of two counts of involuntary manslaughter for the deaths of two commuters who died when he lost control of his car while he was engaging in aggressive driving. The circuit court held that the sentencing court abused its discretion in departing upward three levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" but can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim." As an example, the court noted that bank tellers and bank customers may be indirect victims of a bank robbery. Here, the court held that there was no "evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims." The family members were not victims of the offense of conviction.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The district court did not err in departing one level upward from the applicable sentencing guideline finding that the duration of the offense was outside the "heartland" of the offense of harboring an unlawful alien, that this constituted "extreme conduct" and that it constituted "grounds for departure." The appellate court held that the decision to depart from a particular guideline must be made based on a five-step analysis: (1) a determination of the circumstances and consequences of the offense, (2) whether any of those circumstances are atypical enough to remove them from the "heartland"

of the offense, (3) whether the factor is a forbidden, encouraged, discouraged, or unmentioned basis for departure, (4) assuming it is an encouraged factor, whether the guideline has already accounted for the factor, and (5) whether a departure based on these factors is in fact warranted. The defendant was convicted of conspiracy to harbor an illegal alien and of harboring an illegal alien. The circumstances of the case were such that the appellate court held that a determination that this fell outside the "heartland" of cases was appropriate thereby possibly warranting an upward departure. The unlawful alien in question was brought to the United States by the defendant. She was completely dependant on the defendant as she did not speak the language, did not have control over her own passport or visa, and was illiterate. The defendant and his wife kept her in virtually slave-like conditions, they did not pay her, forced her to work as many as 15 or more hours a day, and the defendant's wife regularly abused her. The district court classified defendant's conduct as "extreme conduct." Under USSG §5K2.8, extreme conduct includes prolonging a victim's pain or humiliation. In this case, the defendant held her for more than 15 years in essentially forced servitude which the appellate court agreed rose to the level of extreme conduct. Upon its finding that the defendant's conduct constituted "extreme conduct" under §5K2.8 the district court only had to determine that the duration prolonged the victim's pain and humiliation. The appellate court held that there was no abuse of discretion in the district court's finding that it did.

§5K2.13 Diminished Capacity (Policy Statement)[19]

United States v. Bowe, 257 F.3d 336 (4th Cir. 2001). The district court erred in denying government's motion to nullify the plea agreement and in granting a USSG §5K2.13 departure for diminished capacity. The defendant, a professional boxer, pled guilty to interstate domestic violence in violation of 18 U.S.C. § 2261. In the plea agreement both the government and the defendant stipulated to an adjusted offense level of 15, both parties agreed to argue for a sentence only within the stipulated range, and the defendant waived the right to contest either a conviction or the sentence in any post-conviction action. In return the government agreed to recommend a reduction under USSG §3E1.1 for acceptance of responsibility, not to file more serious charges against the defendant, and not to prosecute defendant's brother. At the sentencing hearing, the defendant argued that he suffered from diminished capacity at the time of the crime, that this fact was not known at the time that he entered the plea agreement, and that the court should, therefore, grant a USSG §5K2.13 discretionary departure for diminished capacity.[20] The court allowed defendant's counsel to argue for such a departure and to present evidence of the diminished capacity. The government argued that presenting such evidence and making the suggestion to the court to depart downward constituted a breach of the plea agreement. The court disagreed and denied government's motion to nullify the plea agreement. The appellate court found error on both grounds, concluding that the defendant breached the plea agreement and that the district court needed to either accept the agreed-upon level or allow the

[19]Effective April 30, 2003, section 401(b)(5) of Pub. L. 108-21 (PROTECT Act) directly amended this policy statement to add subdivision (4). *See* USSG, App. C, Amendment 649.

[20]The defendant had also previously filed a formal response to the recommendations in the PSR. The response was withdrawn after defendant was notified by the government that it constituted a breach of the plea agreement.

government to nullify the agreement and try the defendant.[21] It further concluded that defendant did not satisfy the criteria set forth in USSG §5K2.13, which states that if "the offense involved actual violence or a serious threat of violence," then "the court may not depart below the applicable guideline range." Because these circumstances involved violence and serious threats of violence, the decision to depart was no longer discretionary and the district court erred in granting the departure.

United States v. Brandon, 247 F.3d 186 (4th Cir. 2001). The district court erred in its determination that defendant was a career criminal under 18 U.S.C. § 924(e)(1) and in applying the corresponding enhancement to his sentence. The defendant pled guilty to unlawful possession of a firearm and received a 180-month sentence, reflecting the enhancement under section 924. The defendant challenged this enhancement on the basis that one of the three required convictions did not meet the criteria set forth in section 924, namely that it was "an offense under state law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The statute relevant to the prior conviction criminalized possession and not possession *with intent* to distribute. The defendant argued that because the intent to distribute was not charged in the indictment, the offense did not fit the definition. The appellate court rejected this argument, concluding that "a prior conviction constitutes a serious drug felony if the underlying crime involves possession with intent to manufacture or distribute, even if that intent is not a formal element of the crime under state law." 247 F.3d at 190. However, the court held that in cases where the intent was not charged as an element of the crime, the inquiry turns to whether it can be inferred from the crime in the abstract. This inference can be made by using the quantity of drugs possessed as an indication of whether the defendant intended to distribute the drugs or intended them for personal use. The statute of defendant's prior conviction penalized possession of 28 to 200 grams of cocaine. Given the broad range, the court determined that it was impossible to infer intent to distribute at all points in the spectrum when considering the crime of possession in the abstract. The court also rejected the possibility of looking to the quantity stipulated in the PSR as impermissible under circuit precedent, but nevertheless held that possession 35 grams of cocaine was not a sufficient amount to infer intent to distribute. The conviction did not satisfy the criteria for the enhancement, and thus, the court was left with only two qualifying prior convictions, a number insufficient to classify the defendant as a career criminal.

§5K2.14 Public Welfare (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The circuit court remanded the case to allow the sentencing court to determine whether the danger created by the defendant's reckless conduct while driving was outside the "heartland" of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. *See* USSG §2A1.4(a)(2). On remand, the sentencing court must determine whether the defendant's reckless driving was "present to an exceptional degree" or was in some other way different from the ordinary case where the factor

[21]The appellate court concluded that it had jurisdiction to hear the government's appeal because the breach of agreement resulted in nullifying the government's implied reciprocal waiver of appeal.

is present. *Citing Koon v. United States*, 518 U.S. 81 (1996). If, on remand, the sentencing court determines that an upward departure is warranted, the court must determine a reasonable departure. In determining the extent of departure, the court may be aided by looking "to the treatment of analogous conduct in other sections of the sentencing guidelines." In the absence of useful analogies, the court must "set forth some form of principled justification for its departure determination."

§5K2.20 Aberrant Behavior (Policy Statement)[22]

§5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)[23]

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented positive evidence that defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 3583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much." The government appealed, asserting that 18 U.S.C. § 3583(g), not USSG §7B1.4, was applicable to the defendant's case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that "once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under section 3583 `necessarily follows.'" *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). The district court did not err in sentencing the defendant to a term of supervised release even though the punishment both exceeded the maximum term of imprisonment authorized by the assimilated state statute and was not authorized by the assimilated state statute. On appeal the court noted that the Assimilated Crime Act ("ACA") provides that a person who commits a state crime on a federal enclave shall be subject to a "like punishment." However, the court determined, federal courts are not completely bound by state sentencing requirements. "Like punishment" requires only that the punishment be similar, not identical. The court noted that although the state statute does not authorize supervised release, it authorized parole. According to the court, both occur following a

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[22]Effective April 30, 2003, section 401(b)(5) of Pub. L. 108-21 (PROTECT Act) directly amended this policy statement. *See* USSG, App. C, Amendment 649.

[23]Effective April 30, 2003, section 401(b)(2) of Pub. L. 108-21 directly amended Chapter Five, Part K, to add this new policy statement. *See* USSG, App. C, Amendment 649.

term of imprisonment, involve government supervision, and serve to facilitate a prisoner's transition into society. Consequently, supervised release was similar enough to parole that a term of supervised release did not violate the ACA's requirement that the defendant be subject to "like punishment." *Cf. United States v. Reyes*, 48 F.3d 435, 437-39 (9th Cir. 1995). The court further noted that, although the total sentence did exceed the maximum term of imprisonment authorized by the state statute, under the federal system, supervised release is not considered to be a part of the incarceration portion of a sentence. To remain faithful to the federal sentencing policy regarding the imposition of supervised release, the court refused to sanction an exception for ACA defendants. Therefore, supervised release under the ACA may exceed the maximum term of incarceration provided for by state law.

United States v. Woodrup, 86 F.3d 359 (4th Cir.), *cert. denied*, 519 U.S. 944 (1996). The district court did not err in imposing a 24-month sentence for the revocation of defendant's supervised release and then imposing a consecutive 240-month sentence for the bank robbery upon which the revocation was based. The defendant argued that the imposition of both sentences violated the Double Jeopardy Clause. In rejecting the defendant's argument, the appellate court noted that when a defendant violates the terms of his supervised release, the sentence imposed is an authorized part of the original sentence. The court noted that this conclusion is supported by the fact that the full range of protections given to a criminal defendant is not required for the revocation of supervised release. The imposition of a sentence upon revocation of supervised release is not a punishment for the conduct prompting the revocation, but a modification of the original sentence for which supervised release was authorized. Analogously, courts have consistently held that subsequent punishment for conduct that gave rise to the revocation of probation does not violate double jeopardy. *United States v. Hanahan*, 798 F.2d 187, 189 (7th Cir. 1986). The Fourth Circuit joined the Ninth Circuit, the only other circuit court to consider this issue, in holding that the sentencing of a defendant for criminal behavior that previously served as the basis for revocation of supervised release does not violate the Double Jeopardy Clause. *See United States v. Soto-Olivas*, 44 F.3d 788, 792 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995).

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented positive evidence that defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 3583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much." The government appealed, asserting that 18 U.S.C. § 3583(g), not section 7B1.4, was applicable to the defendant's case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that "once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under section 3583 `necessarily follows.'" *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Davis, 53 F.3d 638 (4th Cir. 1995). In deciding an issue of first impression, the Fourth Circuit held that the Chapter Seven policy statements regarding the revocation of supervised release are advisory in nature and are not binding on the courts. The Fourth Circuit had previously held in *United States v. Denard*, 24 F.3d 599 (4th Cir. 1994), that the Chapter Seven policy statements are not binding in the context of a probation revocation, and applied that reasoning here, finding no basis for a distinction between a revocation of probation and a revocation of supervised release in determining the mandatory or advisory nature of Chapter Seven policy statements.

United States v. Denard, 24 F.3d 599 (4th Cir. 1994). Title 18 U.S.C. § 3565(a) provides that when a probationer is found in possession of a controlled substance, "the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence." The "original sentence" is the defendant's original guideline imprisonment range. Therefore, the sentence must be at a minimum one-third of the maximum sentence in his original guideline range and at a maximum the guideline's maximum. This decision is consistent with *United States v. Granderson*, 511 U.S. 39 (1994). Although this rule may provide a sentence that is inconsistent with the probation revocation tables in USSG §7B1.4, the policy statements contained in Chapter Seven are intended to provide guidance and are not binding on the courts.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C2.5 Culpability Score

United States v. Brothers Construction Company of Ohio, Inc., 219 F.3d 300 (4th Cir.), *cert. denied*, 531 U.S. 1037 (2000). The defendant corporations were convicted of conspiracy to defraud the United States, two counts of wire fraud, and one count of making a false statement. Defendant Tri-State Asphalt Corporation received a $500,000 fine; defendant Brothers Construction Company received no fine due to insolvency. Tri-State appealed, *inter alia*, the district court's imposition of a three-level sentencing enhancement for obstruction of justice. *See* USSG §8C2.5(e). The district court found, in imposing the enhancement, that an agent of Tri-State had made a false statement in a letter to investigators, and given perjurous grand jury testimony, regarding the organization's compliance with a state program fostering the development of disadvantaged business enterprises. Tri-State argued that the enhancement constituted double counting insofar as the letter constituted the act for which Tri-State was convicted of conspiracy to defraud and making a false statement. The appellate court held, however, that because the district court identified another separate, independent basis for applying the obstruction of justice enhancement, namely, the grand jury testimony, the enhancement was not erroneous. Further, the district court's finding that the grand jury testimony was false as to a material fact and was willfully given to obstruct justice was not clearly erroneous.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Cannady, 283 F.3d 641 (4th Cir.), *cert. denied*, 537 U.S. 936 (2002). The district court did not err by making comments during the plea proceeding since those comments did not rise to the level of participation in plea negotiations. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute cocaine and heroin. Included in the plea agreement was a waiver of defendant's right to initiate proceedings under 28 U.S.C.A. § 2255. The government informed the defendant that the waiver provision was required by the judge for all plea agreements and the defendant agreed. At the plea proceeding the judge told the defendant that if he did not agree to the waiver there would be no agreement. Rule 11(e)(1) provides that the attorneys for the defendant and the government may participate in plea negotiations but the judge may not. The appellate court held that since the parties had negotiated and signed a plea agreement before the judge became involved, his comments could not be "with a view toward reaching a plea agreement"–the definition of participation under Rule 11(e)(1). Furthermore, the appellate court held that there was nothing coercive about the judge's comments during the plea proceeding–rather the judge was encouraging the defendant to make a decision whether to plead guilty or go to trial; the choice was his. The judge was, according to the appellate court, trying to be certain that the defendant was pleading guilty of his own free will. The appellate court does not give an opinion on the defendant's second contention that the judge erred by requiring inclusion of a section 2255 waiver in all plea agreements. The court states that such a requirement would not likely be erroneous, however, they did not have enough information to determine if such a requirement actually existed.

United States v. Carr, 271 F.3d 172 (4th Cir. 2001). The district court erred in its determination that there was a sufficient factual basis to support the defendant's guilty plea to one of the counts with which he was charged and remanded the case to the district court. At the Rule 11 hearing, the defendant was asked, "Did you as charged in Count 1 set fire to a building in order to damage it and the building was property used by another in or effecting [sic] interstate commerce and you did this intentionally?" To which the defendant replied "Yes, sir." Because, it is unclear whether his response referred to his own actions and not to his knowledge of use of the property in interstate commerce, the court held that this evidence was not enough to support the guilty plea and vacated the judgement of conviction.

United States v. General, 278 F.3d 389 (4th Cir.), *cert. denied*, 535 U.S. 949 (2002). The district court did not err by not reciting the mandatory minimum during the plea hearing. The appellate court held that although the district court must inform the defendant of any statutory mandatory minimums before accepting a guilty plea failure to do so orally may not violate the defendant's substantial rights. Since the plea agreement itself provided all the information the defendant would have gotten from the court, the appellate court held that there is no Rule 11 violation. The defendant argued that although the plea agreement did inform him of the mandatory minimums, it did not inform him that the sentences would run consecutively. The court held that there was no error because Rule 11 does not require that defendant be informed that sentences will run consecutively.

The district court further did not err in not specifically asking the defendant if he understood the waiver provision of his plea agreement. The plea agreement contained a provision whereby the defendant waived his right to appeal his sentence. The appellate court reviewed the totality of the circumstances and held that because the defendant was informed of his appellate rights and that those rights could be waived in a plea agreement, was represented by

counsel, and the waiver was unambiguous and plain within the plea agreement, the waiver was knowing, voluntary, and thus valid.

United States v. Goins, 51 F.3d 400 (4th Cir. 1995). The trial court erred in failing to inform the defendant during the Rule 11 hearing that a guilty plea would result in a mandatory minimum sentence. The defendant had not been aware of the mandatory minimum sentence until the presentence report was prepared, nearly three months after the plea had been accepted. The government argued that the error was harmless, but the circuit court held that a violation cannot be considered harmless if the defendant had no knowledge of the mandatory minimum at the time of the plea. In considering this issue of first impression, the Fourth Circuit joined the Fifth and Eleventh Circuits in concluding that a district court's failure to inform the defendant of the mandatory minimum is reversible error. *See United States v. Watch*, 7 F.3d 422 (5th Cir. 1993); *United States v. Hourihan*, 936 F.2d 508 (11th Cir. 1991).

United States v. Good, 25 F.3d 218 (4th Cir. 1994). The district court's failure to explain to the defendant the significance of supervised release amounted to harmless error. Although he was advised of the possible minimum and maximum penalties, the defendant claimed that he was unaware when he pleaded guilty that his punishment could include additional incarceration if he violated the terms of his supervised release. He argued that since 21 U.S.C. § 841(b)(1)(B) only provides for a minimum period of supervised release, the judge could extend his supervised release term to life and thereby expose him to the possibility of prison for life. The circuit court concluded that the maximum supervised release time for a first offender guilty of a class B felony is five years. The court pointed out that this conclusion is consistent with USSG §5D1.2 which provides for a term that is at least three years but not more than five years or the minimum period required by statute, whichever is greater, for a defendant convicted under a statute that requires a period of supervised release. Since the defendant pleaded guilty to an offense which requires a supervised release term of at least four years, he faced a maximum term of five years, not life. The lower court's failure to warn him of this conclusion was harmless error because "the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive." *United States v. Moore*, 592 F.2d 753, 756 (4th Cir. 1979). The circuit court noted that the Ninth Circuit accepts the interpretation suggested by the defendant, but it explicitly declined to follow that view. *See Rodriguera v. United States*, 954 F.2d 1465 (9th Cir. 1992); *United States v. Sanclemente-Bejarano*, 861 F.2d 206, 209 (9th Cir. 1988) ("pursuant to 18 U.S.C. § 3593(e)(2), a supervised release term may also be extended, potentially to a life term, at any time before it expires.").

United States v. Martinez, 277 F.3d 517 (4th Cir.), *cert. denied*, 537 U.S. 899 (2002). The district court erred in advising the defendant of incorrect potential penalties during his plea hearing and by failing to advise the defendant that he could not withdraw his plea after sentencing. However, the appellate court held that the errors were not reversible because there was no evidence that defendant might have changed his plea in light of the omitted information. The appellate court first held that in the context of Rule 11 the proper standard of review for forfeited error is a plain error analysis. Under Rule 11(c)(1) the district court is required to inform the defendant of the permissible maximum and minimum sentences for his offense. The appellate court held that the district court erred by telling the defendant that he was subject to a ten-year minimum sentence and a maximum sentence of life. In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this information was incorrect.

The district court erred in not informing the defendant that if the court decided not to accept the government's sentencing recommendation, he would not be able to withdraw his plea. The appellate court held that even though the district court made it clear to the defendant that it was not bound by the government's recommendation, it did not make sure that he understood that he would not be free to withdraw his plea.

The district court did not err, under Rule 11, by not informing the defendant that drug quantity constituted an element of the offense because drug quantity was not an element of the substantive offense.

The district court did not err in adopting the presentencing report as a factual basis for the guilty plea. The appellate court held that as long as the court has a reasonable basis to determine that there was sufficient factual basis for the guilty plea there will be no error. The presentencing report constitutes such a factual basis.

Although the appellate court held that the district court erred in several respects under Rule 11 and that those errors were plain, the court further held that the defendant failed to demonstrate that either error affected his substantial rights–the third prong of a plain error analysis. The appellate court held that the defendant must show that absent the errors made by the court, he would not have agreed to the plea agreement. Because the defendant was facing multiple charges, many of which were dropped through the plea agreement, it is unlikely that he would have changed his mind about the agreement based on a different potential sentence for only one of the remaining charges; principally because the differing sentence would have reduced his potential sentence to 100 years and $6 million dollars (from 160 years and $7.5 million), and thus, there is no reason to think that such a change would have motivated him to withdraw. Furthermore, the appellate court held that there was no information in the record that indicated that the defendant was entering into the agreement assuming he could withdraw if the government's recommendation was rejected.

United States v. Thorne, 153 F.3d 130 (4th Cir. 1998), *cert. denied*, 531 U.S. 895 (2000). The district court's failure to inform defendant at his Rule 11 hearing that his sentence would include a term of supervised release and to describe to him the nature of supervised release before accepting his guilty plea was error. The court of appeals held that the court's oversight was not harmless error as outlined in *United States v. Good*, 25 F.3d 218 (4th Cir. 1994). The maximum term Thorne understood he could receive (235 months) was less than his actual sentence of 248 months (188 months in prison plus 60 months of supervised release). In the event he violated release, he would be subject to a further five years of incarceration, resulting in an even greater disparity. The court of appeals ordered that Thorne be permitted to withdraw his plea and plead anew.

United States v. Osborne, 345 F.3d 281 (4th Cir. 2003). The district court was not required, absent a defendant's request, to review *de novo* the Rule 11 proceedings conducted by a magistrate judge. Defendant entered a guilty plea before a magistrate judge to one count of conspiring to possess with intent to distribute cocaine and cocaine base. One of the issues on appeal was whether the district court erred in failing to review *de novo* the Rule 11 proceedings conducted by the magistrate judge. The Fourth Circuit noted that every circuit having considered this issue held that the Federal Magistrates Act authorized a magistrate judge to conduct Rule 11 plea proceedings. The court noted that defendant could have requested review by the district judge of her Rule 11 plea proceeding; however, she did not. Therefore, the court held that *de novo* review was not required where the defendant clearly consented to entering a

plea before a magistrate judge and raised no objection to the Rule 11 proceeding. In other words, unless defendant requested such review or objected to some aspect of the magistrate judge' s plea colloquy, a district judge was not bound to conduct *de novo* review. Accordingly, defendant's conviction and sentence were affirmed.

Rule 32

United States v. Cole, 27 F.3d 996 (4th Cir. 1994). The district court committed plain error in denying the defendant his right of allocution, in violation of Fed. R. Crim. P. 32(a)(1)(C). The district court conducted a colloquy only after it pronounced the defendant's sentence. Further, it appeared from the record that the sentencing judge discouraged the defendant from addressing the court. Although the defendant did not object below, the circuit court found that the district court committed plain error which was prejudicial, in that the defendant may have persuaded the sentencing judge that he was responsible for a lesser quantity of drugs, that he had accepted responsibility, and merited a lower sentence.

United States v. McManus, 23 F.3d 878 (4th Cir. 1994), *cert. denied*, 535 U.S. 1008 (2002). The district court did not violate the provisions of Rule 32(a)(1)(A), which requires the sentencing court to determine that the defendant had the opportunity to read and discuss the PSR with his counsel before sentencing, by failing to pose certain questions to the defendant regarding his PSR. The Fourth Circuit declined to adopt the Seventh Circuit's approach in *United States v. Rone*, 743 F.2d 1169 (7th Cir. 1984), requiring the district court to ask specific questions about whether the defendant had read and discussed the PSR with counsel and whether the defendant wished to challenge any facts in the report. Rather, the Fourth Circuit held that there is no particular methodology for compliance with Rule 32(a)(1)(A). The defendant's markings such as "I surrender" on the PSR, his objections to the findings in the PSR, and his statements at sentencing about the trial evidence all indicated that the requirements of Rule 32 had been met.

United States v. Myers, 280 F.3d 407 (4th Cir.), *cert. denied*, 537 U.S. 852 (2002). The district court did not err by allowing victim allocution testimony because the defendant was convicted of a crime that involved the "use or attempted or threatened use of physical force." The appellate court held that because the language of the rule is "involved" and the rule is silent regarding the elements of the crime, physical force does not have to be an element of the offense of conviction. The defendant was convicted by a jury of possessing and using a firearm in furtherance of drug trafficking. The defendant argued that this was not a crime of violence under USSG §§4B1.1, 4B1.2 and therefore should not be considered as involving physical force. However, the appellate court agreed that the determination as to whether this was a crime of violence was appropriately made under Federal Rule of Criminal Procedure 32(c)(3)(E). Therefore, since the appellate court found that this crime is a crime of violence under Rule 32, the allowance of victim allocution testimony was proper.

United States v. Spring, 305 F.3d 276 (4th Cir. 2002). On plain error review, the court of appeals determined that the district court had erred in upwardly departing from Criminal History Category IV to V without affording the defendant notice of its intent to do so, in violation of Federal Rule of Criminal Procedure 32(c)(1). The sentence was vacated and remanded to allow the district court to consider an upward departure after hearing argument from the parties.

See United States v. Walker, 29 F.3d 908 (4th. Cir. 1994); §1B1.3, p. 4.

Rule 35

United States v. Martin, 25 F.3d 211 (4th Cir. 1994). The district court denied the government's motion to reduce the defendant's sentence pursuant to Fed. R. Crim. P. 35(b) based upon his extensive cooperation with the government prior to the original sentencing. The government indicated at the defendant's initial sentencing that a substantial assistance motion would be filed at a later date pursuant to office policy. Almost 12 months after the defendant's initial sentencing, the government filed its Fed. R. Crim. P. 35(b) motion. The district court denied the motion on the basis that it lacked authority to grant the departure. The circuit court held that the government was required to make a USSG §5K1.1 substantial assistance motion at the time of sentencing for substantial assistance rendered prior to sentencing. A delay in making a substantial assistance motion, on the grounds that a Fed. R. Crim. P. 35(b) motion will be made at a later date, denies a defendant due process. However, the circuit court held that the defendant's plea agreement was effectively modified by the government's accession to make a substantial assistance motion based upon the defendant's presentence assistance, and the defendant was entitled to specific performance of this promise on remand.

OTHER STATUTORY CONSIDERATIONS

United States v. Bowe, 309 F.3d 234 (4th Cir. 2002). The defendant pleaded guilty to a one-count indictment charging him with interstate domestic violence. Pending the defendant's appeal of an upward departure based on his own breach of the plea agreement, the defendant served time on probation. Upon remand from the court of appeals instructing the district court to sentence the defendant within the established guideline range, the district court credited defendant's sentence with the time he had served on probation. The government appealed this credit. The court of appeals held that credit for time served on probation was improper and inconsistent with 18 U.S.C. § 3585(b), which allows computation for credit only for time spent in *official detention*.

United States v. Cobb, 144 F.3d 319 (4th Cir. 1998). The district court did not err in refusing to dismiss the carjacking count against the defendant. The court of appeals rejected the defendant's argument that the federal carjacking statute, 18 U.S.C. § 2119, exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. The Fourth Circuit joined other circuits which have considered the issue in holding that the carjacking statute lies within the bounds of Congress' commerce power.

United States v. Dawkins, 202 F.3d 711 (4th Cir.), *cert. denied*, 529 U.S. 1121 (2000). The defendant, a former postal employee, was convicted of making false statements to obtain federal employee's compensation. As the district court erred in calculating the amount of loss for sentencing purposes, it necessarily would also have to reconsider the matter of restitution on remand inasmuch as the amount of restitution depends on the amount of loss. *See* Mandatory Victim Restitution Act of 1996, 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A)(ii), 3664(f)(1)(A). The appellate court noted that the district court fulfilled its obligation under the Act to specify the manner and schedule by which the defendant was to pay restitution by providing for an

alternative repayment schedule should the defendant be unable to pay the total amount of restitution due immediately. However, the district court failed to make all the necessary factual findings for determining how the restitution was to be paid, as required by the Act. Specifically, the district court failed to make any factual findings keying the defendant's financial situation to the restitution schedule ordered, and failed to find that the restitution order was feasible. The appellate court ordered the district court to make such findings on remand.

United States v. Kinter, 235 F.3d 192 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001). The appellate court held that where sentencing enhancements under the sentencing guidelines did not extend defendant's sentence beyond the maximums under the applicable criminal statute, the government was not required to submit to a jury and prove beyond a reasonable doubt the facts relevant to those enhancements. The defendant was convicted of conspiracy, bribery of a public official, and payment of a gratuity to a public official. An IRS employee, who was the former son-in-law of defendant, informed the defendant that the IRS planned to consolidate many of its computer maintenance contracts into a single, multimillion dollar contract to be awarded to a company certified by the Small Business Administration as a section 8(a) contractor. The defendant and a co-conspirator decided to "sell" the influence of this IRS employee to Washington Data, a contractor, in exchange for kickbacks from Washington Data. The kickback due the defendant and co-conspirator was three percent of the revenue that defendant and co-conspirator secured for Washington Data. The IRS employee was initially paid $300 per week, which later increased to $500 per week after the IRS employee recommended Washington Data to the contracting officer at the IRS and Washington Data obtained its first purchase order.

At sentencing, under the preponderance of the evidence standard, the court determined that defendant paid more than one bribe and that Washington Data's profit was $9.5 million. Such findings required the court to impose a sentence between 46 and 57 months. The defendant was sentenced to 46 months. In the absence of these findings, the maximum punishment allowable under the Sentencing Guidelines for defendant would have been ten months. The defendant appealed, contending that *Apprendi* requires these two facts to be submitted to a jury and proven beyond a reasonable doubt before forming the basis of an enhancement to his sentence. The appellate court noted that to find the "prescribed statutory maximum" as contemplated by *Apprendi*, one need only look to the language of the statute criminalizing the offense, and no further. The governing statutes in defendant's case, 18 U.S.C. §§ 201(b)(1) and 371, permit sentences of up to 15 and 5 years respectively, which are well in excess of the 46-month concurrent sentences that defendant received. The court affirmed defendant's sentence and found no *Apprendi* violation.

POST-*APPRENDI* (*Apprendi v. New Jersey*, 530 U.S. 466 (2000))

United States v. Angle, 254 F.3d 514 (4th Cir.), *cert. denied*, 534 U.S. 937 (2001). Defendants Angle and Phifer, who were convicted of conspiracy to possess with the intent to distribute and conspiracy to distribute cocaine and cocaine base,[24] were not able to establish *Apprendi* errors that affected their substantial rights. The district court did not err with respect to the Angle's sentence because the sentence imposed was 210 months and did not exceed the

[24]Phifer was also convicted on two counts of money laundering.

statutory maximum of 240 months. Nevertheless, the court vacated Angle's sentence and remanded for a finding of drug type and quantity because no official finding was made either by the jury or the sentencing judge.[25] Phifer's sentence of 292 months, on the other hand, did exceed the statutory maximum and was therefore *Apprendi* error. This error, however, did not affect his substantial rights because an application of USSG §5G1.2(d) would have yielded the same result. Section 5G1.2(d) requires that, in a multiple offense case where the applicable sentencing range exceeds the highest statutory maximum, "the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment." The result is that the total punishment required by the guideline range can still be satisfied without exceeding the statutory maximum for any one of the offenses, and thus, without running afoul of *Apprendi*.[26] The court distinguished language in *Apprendi* which cast doubt on its holding by reasoning that the *Apprendi* language was applicable to an argument against a finding of error, whereas in this case the court already made a finding of error and was considering whether the error affected the defendant's substantial rights. *Angle*, at *4.

United States v. Benenhaley, 281 F.3d 423 (4th Cir.), *cert. denied*, 537 U.S. 869 (2002). The district court erred in imposing a life sentence for a conviction of conspiracy to possess methamphetamine with intent to distribute it because the life sentence exceeded the statutory maximum otherwise applicable under section 841(b)(1)(C). In light of the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), such a departure above the statutory maximum is in error if the departure is based on evidence not proved to the jury beyond a reasonable doubt.

United States v. Cannady, 283 F.3d 641 (4th Cir.), *cert. denied*, 537 U.S. 936 (2002). The district court did not err by not informing the defendant that drug quantity was an element of the drug offense underlying his conspiracy charge because drug quantity is not an element of section 841(b)(1)(C) violations. The district court did err in informing the defendant that he faced a maximum penalty of life imprisonment. Although the sentencing occurred before the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001), *cert. denied*, 535 U.S. 1098 (2002), in light of those decisions, his maximum penalty was actually 20 years. However, the defendant was not prejudiced by the error inasmuch as he made no argument that the information regarding the maximum sentence influenced his decision to plead guilty. Furthermore, the record showed not only that he wanted to plead guilty, but also that he did not want to go to trial under any circumstances. The error, though plain, was therefore not prejudicial and is insufficient to set aside his guilty plea.

United States v. Carrington, 301 F.3d 204 (4th Cir. 2002). The defendant was convicted of conspiring to traffic in an unspecified amount of crack cocaine. The Supreme Court vacated and remanded the decision in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Carrington v. United States*, 531 U.S. 1062 (2001). On remand, the court of appeals concluded that it was

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[25] *Cf. United States v. Osteen*, 254 F.3d 521 (4th Cir. 2001) (the district court did not err in its finding of drug amount which was based on the approximation given by a credible witness and was supported by competent evidence).

[26] *See also United States v. White*, 238 F.3d 537, 543 (4th Cir.), *cert. denied*, 532 U.S. 1074 (2001); *United States v. Stewart*, 256 F.3d 231, 256 (4th Cir.), *cert. denied*, 122 S. Ct. 633 (2001).

plain error to have sentenced the defendant on an indictment that did not specify drug quantity. However, the court declined to correct the error because the evidence of drug quantity necessary to justify the sentence imposed was overwhelming and essentially uncontroverted. Judge Neimeyer stated that reducing the sentence based on a "technical error never objected to at trial would threaten the fairness, integrity, and public reputation of the judicial proceedings." *Id*. at 206.

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court did not err in convicting the defendant under 21 U.S.C. § 841 even in light of the rule of *Apprendi* that any factor other than a prior conviction that increases a defendant's sentence beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. The defendant argued that 21 U.S.C. § 841 is facially unconstitutional. The appellate court followed its own holding from *United States v. McAllister*, 272 F.3d 228 (4th Cir. 2001), that 21 U.S.C. § 841 is not facially unconstitutional. *See also United States v. Dinnall*, 269 F.3d 418 (4th Cir. 2001), *cert. denied*, 123 S. Ct. 1600 (2003) (the district court erred in sentencing the defendant to 30 years because his sentence exceeded the maximum of 20 years under 21 U.S.C. § 841 (b)(1)(C) for which he was indicted and to which he pled guilty).

United States v. General, 278 F.3d 389 (4th Cir.), *cert. denied*, 535 U.S. 949 (2002). The district court did not err in failing to inform the defendant that the government would be required to prove drug quantity beyond a reasonable doubt. The appellate court held that it will look to the ultimate sentence to determine if a decision in sentencing is in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Since the defendant received a sentence that falls within the statutory range of his charged offense, there is no violation of a *Apprendi* and therefore no error. Furthermore, failure to include drug quantity in defendant's indictment does not invalidate his guilty plea because drug quantity is not an element of the charge for which he was sentenced. The defendant pled guilty to one count of conspiracy to distribute and possession with intent to distribute cocaine base, cocaine powder, heroin and marijuana and one count of using and carrying a firearm during and in relation to a drug trafficking offense.

The district court did not err in imposing a five-year term of supervised release in connection with his conviction for conspiracy to distribute and possession with intent to distribute. The defendant claims that the statute allows for a maximum term of three years of supervised release and that his sentence therefor is in violation of *Apprendi*. The appellate court held that defendant misread the statute and that three years is actually the minimum supervised release term and therefore, *Apprendi* is inapplicable.

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001), *cert. denied*, 537 U.S. 839 (2002). The Fourth Circuit held that the district court correctly sentenced the defendants to ten-year consecutive sentences for their 21 U.S.C. § 924(c) firearm convictions. Because a firearm was discharged during the offense, the district court correctly imposed the ten-year sentence under 18 U.S.C. § 924(c)(1)(A)(iii). The court discounted the *Apprendi* claim the defendants posed; the fact that it was not determined beyond a reasonable doubt whether the firearm employed was a semi-automatic weapon was not relevant because the classification of a firearm as a semi-automatic weapon under 18 U.S.C. § 924(c)(1)(B)(i) was a sentencing factor, not an element of the offense.

United States v. Lewis, 235 F.3d 215 (4th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001). The appellate court concluded that because no fact found by the district court in determining the defendant's sentence resulted in a penalty greater than the applicable statutory maximum, the defendant's due process rights were not violated. The defendant was convicted of numerous charges relating to the filing of false income tax returns. The defendant appealed her sentence arguing that her sentence was imposed in violation of the Due Process Clause because the tax loss on which her guideline range was based was not charged in the indictment and found by the jury beyond a reasonable doubt. In making this argument, the defendant relies on the recent decision of the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The appellate court noted that the decision of the Supreme Court in *Apprendi* was, by its terms, limited to facts that increase punishment beyond the prescribed statutory maximum. The appellate court concluded that *Apprendi* was inapplicable because no fact found by the district court increased the punishment beyond the statutory maximum.

United States v. Martinez, 277 F.3d 517 (4th Cir.), *cert. denied*, 537 U.S. 899 (2002). The appellate court held that 21 U.S.C. § 841 is not facially unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The defendant argues that 21 U.S.C. § 841 is unconstitutional because it removes certain facts from the province of the jury and from a beyond a reasonable doubt standard. However, the appellate court asserts its own precedent that *Apprendi* does not render 21 U.S.C. § 841 unconstitutional, and thus defendant's challenge has no merit.

United States v. Myers, 280 F.3d 407 (4th Cir.), *cert. denied*, 537 U.S. 852 (2002). The district court did not err when it imposed a life sentence without parole for the defendant's conviction for possession of a firearm by a felon because a life sentence does not exceed the statutory maximum imposed by 18 U.S.C. § 924(e)(1) and therefore is not in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The appellate court refused to extend *Apprendi* to include cases where the statutory maximum was not exceeded.